TRANSCRIPT OF RECORD

REME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

No. 75

EDERAL TRADE COMMISSION, PETITIONER

VB.

MOTION PICTURE ADVERTISING SERVICE ... COMPANY, INC.

RIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION POR CERTIORARI FILED MAY 20, 1952 CERTIORARI GRANTED OCTOBER 18, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 75

FEDERAL TRADE COMMISSION, PETITIONER

VS.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In United States Court of Appeals for the Fifth Circuit

No. 13493

PICTURE ADVERTISING SERVICE COMPANY, INC., A
CORPORATION, PETITIONER

VERSUS

Petitioner's designation as to printing record

Filed June 27, 1951-

otion Picture Advertising Service Company, Inc., petitioner appellant in the above entitled action, designates the follow-portions of the record to be contained in the transcript on apin the above entitled action:

Petition to review and set aside order of Federal Frade Comion filed December 27, 1950.

Complaint filed May 26, 1947.

Answer of respondent filed June 16, 1947,

Order denying plea of res judicata filed February 20, 1948.

 Opinion of Federal Trade Commission on plea of res judicata filed February 20, 1948.

Proposed findings and conclusions of respondent filed h 14, 1949.

Suggested findings and conclusion of counsel supporting the blaint filed March 15, 1949.

Order closing proceedings filed April 26, 1949.

Trial Examiner's recommended decision filed May 31, 1949.

Stipulation filed June 15, 1949.

Findings as to facts and conclusion filed October 17, 1950. Order to cease and desist filed October 17, 1950.

Opinion of the Commission filed October 17, 1950.

Dissenting opinion of Commission Lowell B. Mason.

Motion to modify cease and desist order filed December 29,

Answer to motion to modify order to cease and desist filed January 15, 1951.

17. Order denying respondent's motion to modify order to cease and desist filed March 6, 1951.

FTC VS. MOTION PICTURE ADVERTISING SERVICE CO., INC. 18. This stipulation. ROSEN, KAMMER, WOLFF, HOPKINS & BURKE, LOUIS L. ROSEN, Attorneys for Motion Picture Advertising Service Company, Inc., Petitioner and Appellant. 1801 HIBERNIA BANK BUILDING, NEW ORLEANS, LOUISIANA. STIPULATION I have examined the copy of the designation of petitioner and

gree that the items therein listed contain all the portions of the ecord necessary to be included in the transcript on appear. (S) Jno. W. Carter, Jr.

> (JNO. W. CARTER, Jr.), Acting Assistant General Counsel in Charge of Appeals.

JUNE 22. 1951.

In United States Court of Appeals

Commission

. Petition to review and set aside order of Federal Trade.

Filed December 27, 1950

Title omitted.

o the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioner, Motion Picture Advertising Service Company, nc., respectfully shows:

That your petitioner is, and at all times hereinafter mentioned

vas, a corporation organized and existing under and by virtue of he laws of the State of Louisiana, having its office and principal clace of business in the City of New Orleans, State of Louisiana, nd carrying on business of motion picture advertising within he jurisdiction of this Court, to wit within the State of Louisina, and elsewhere within the United States.

That on May 26, 1947, the Federal Trade Commission, in a proceeding entitled; "In the matter of Motion Picture Advertising Service Company, Inc., a Corporation," Docket

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and that and 498, issued its complaint against your petitioner in which is alleged, among other things, that in the course and consoft its business petitioner enters into long-term agreements motion picture exhibitors for the exclusive display of petics advertising films on the screens of said exhibitors, and said exclusive screening agreements constitute an unfaired of competition in commerce, which result in an unlawful put of trade, or which tend to monopolize the industry in ion of the provisions of Section 5 of the Act of Congress ved September 26, 1914, 38 Stat. 717 (Ü. S. C., Title 15, Section), as amended March 21, 1938, 52 Stat. 111, commonly as the "Federal Trade Commission Act."

III

at thereafter your petitioner filed its answer to the said comissued against it under which petitioner denied that the ce complained of constituted an unreasonable restraint of or tended to monopolize the industry, or was an unfair of of competition in violation of the provisions of Section aid "Federal Trade Commission Act," and petitioner denied material allegations in said complaint contained.

IV

at thereafter the Federal Trade Commission held hearings a Trial Examiner appointed by the Federal Trade Commission, and received testimony and other evidence in support of said complaint and in opposition thereto, which said testimony so taken was reduced to writing and filed office of the Federal Trade Commission.

V

t thereafter on May 31, 1949, the said Trial Examiner of ederal Trade Commission made and filed his "Trial Exam-Recommended Decision" in said proceeding, copy of said report was served upon your petitioner.

VI

thereafter on October 17, 1950, the Federal Trade Comon issued in said proceedings its "Findings As To The Facts conclusion," together with "Order To Cease, and Desist"; aid order directed against your petitioner is in the words gures following, to wit: "It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the rederal Trade Commission Act, do forthwith cease and desist from—

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when

the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

"It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order."

VII

That said "Order To Cease And Desist" was served upon your petitioner by registered mail on November 2, 1950.

VIII.

That the said "Findings As To The Facts And Conclusion" of said Federal Trade Commission are in material respects contrary to the law and the evidence; that the "Order to Cease and Desist" issued by the Commission against your petitioner is not supported by the facts in the record, or by the law, and, therefore, should be set aside and annulled.

IX

That petitioner makes the following assignment of errors upon which it intends to rely:

(1) That the Federal Trade Commission erred in failing to hold that it does not have jurisdiction of the proceedings because the interest of the public is not involved within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(2) That the Federal Trade Commission erred in failing to hold that it does not have jurisdiction of the proceedings because of the Commission's prior adjudication in Docket No. 4736 of the sole issue involved in this proceeding and, therefore, petitioner's

plea of "res judicata" should have been sustained by the Commission.

(3) That the Federal Trade Commission erred in refusing to hold that the evidence in the record is insufficient to sustain the

allegations of the complaint.

(4) That the Federal Trade Commission erred in refusing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not constitute an unfair method of competition in commerce, and the interest of the public is not involved, within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(5) That the Federal Trade Commission erred in failing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not unduly restrain, lessen, suppress, or injure competition in the interstate sale, lease, rental, or distribution of advertising films, and do not unduly hinder or prevent competing producers, sellers and distributors of advertising films from selling, leasing, rent-

ing, or distributing such films, and do not monopolize in said petitioner the sale, lease, rental, or distribution of ad-

vertising films in commerce.

(6) That the Federal Trade Commission erred in failing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not have a tendency to hinder or prevent, and have not actually hindered or prevented, competition in the sale, lease, rental, or distribution of advertising films in commerce within the meaning and intent of the "Federal Trade Commission Act"; and have not unreasonably restrained such commerce in advertising films, and do not have a tendency to create in petitioner a monopoly in the sale, lease, rental, or distribution of such films, and do not constitute unfair methods of competition in commerce within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(7) That the Federal Trade Commission erred in refusing to dismis the complaint against your petitioner which was not sup-

ported by the facts in the record or by the law.

(8) That the Federal Trade Commission erred in issuing the "Cease And Desist Order" which prohibits petitioner from "continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order, since the issuance of any retroactive order

by the Federal Trade Commission was not raised in the pleadings, or made an issue in the proceedings, and no

evidence of the effect of such an order of petitioner is contained in the record.

Wherefore, petitioner prays that a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission to the end that said Commission may be required, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, wherein said "Cease And Desist Order" was entered, including all of the testimony taken, the recommended findings as to the facts, conclusion, decision, and "Cease And Desist Order" made by the Trial Examiner in said proceedings, and the report and order of said Commission, and that upon a review of said Order, in and by this Honorable Court the "Cease and Desist Order" of the Federal Trade Commission aforesaid be set aside or, in the alternative, that said "Cease and Desist Order" be modified by deleting therefrom the following words, to wit:

"

* or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from

the date of the service of this order."

Rosen, Kammer, Wolff, Hopkins & Burke, Louis L. Rosen,

Attorneys for Motion Picture Advertising Service Co., Inc., a Corporation, Petitioner.

[Duly sworn to by Louis L. Rosen; jurat omitted in printing.]

In United States Court of Appeals

Order to file petition

Filed December 27, 1950

[Title omitted.],

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A petition to review the Order of the Federal Trade 12 Commission, entered October 17, 1950, "In the Matter of Motion Picture Advertising Service Company, Inc., a Corporation" Docket No. 5498, having been presented to this Court;

It Is Ordered that said petition be filed and that a copy of this order and said petition be forthwith served upon the Federal Trade Commission, and that said Federal Trade Commission, upon service of such copies, forthwith certify and file in this Court, a transcript of the entire record in said cause.

(Signed) WAYNE G. BORAH, United States Circuit Judge.

New Orleans, Louisiana, December 27, 1950.

Before Federal Trade Commission

Docket No. 5498

THE MATTER OF MOTION PICTURE ADVERTISING SERVICE
COMPANY, INC., A CORPORATION

Complaint

May 26, 1947

Pursuant to the provisions of the Federal Trade Commission act and by virtue of the authority vested in it by said Act, the rederal Trade Commission, having reason to believe that Motion Picture Advertising Service Company, Inc., a corporation, here-nafter referred to as respondent, has violated the provisions of section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One. Respondent is a corporation organized under he laws of the State of Louisiana with its office and principal lace of business located at 1032 Carondelet Street, New Orleans,

ouisiana.

Paragraph Two. Said respondent for more than ten years last east has been, and is now, engaged in the business of producing, elling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of such films. Said respondent furnished display services to advertisers through the exhibiting of such films upon the screens of motion picture theaters throughout the United States, with whom respondent has screening

greements.

Said respondent is one of the largest producers and distributors of commercial or advertising films in the United States and causes aid films when produced, sold, leased, or rented to be transported from its place of business to motion picture theaters located hroughout the several States of the United States and in the District of Columbia, where said films are displayed on the creens of such theaters for a specified period of time, usually one week. Upon the conclusion of the display period such films are returned by the theater or exhibitor to said respondent.

There has been, and now is, a constant recurring course and low of said films in interstate commerce throughout the several

States of the United States and in the District of Columbia.

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Paragraph Three. Said respondent has been from time to time, and is now, in active and substantial competition with other distributors of commercial or advertising films in the sale, rental, and distribution thereof in said commerce.

Paragraph Four. In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion-picture exhibitors for the ex-

clusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the

theater or theaters owned or controlled by said exhibitors, whereby said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are known and designated as "Theatre Screening Agreements" and provide, in part, that said respondent is granted the exclusive privilege of exhibiting commercial or advertising film or slide advertising on the screen of the exhibitor and that the said exhibitor will not display commercial or advertising films, other than that furnished by said respondent, except announcements of exhibitor's coming attractions and charitable, civic, and governmental announcements, for which no compensation is to be received by the exhibitor. The foregoing provision has been enforced by said respondent and adhered to by a substantial number of exhibitors located in various States of the United States and in the District of Columbia.

Paragraph Five. The capacity, tendency and effect of the afore-said agreements and of the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, suppress and injure competition in the interstate sale, lease, rental and distribution of commercial or advertising films, and to unduly hinder and prevent competing producers, sellers and distributors of commercial or advertising films from selling, leasing, renting and distributing such films from the various States of the United States, where said producers, sellers and distributors are located, to and into various other States where motion picture exhibitors are located, and to monopolize in said respondent the sale, lease, rental and distribution of commercial or advertising films in commerce

as herein set out.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through said other film distributors, have been compelled, as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

Paragraph Six. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of said respondent

and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the selling, leasing; renting and distributing of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such confinerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain areas of the United States in the selling, leasing, renting and distributing of such films, and constitute unfair methods of competion in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, The Premises Considered, The Federal Trade Commission on this 26th day of May A. D. 1947, issues its complaint against said respondent.

NOTICE 4

Notice is hereby given you, Motion Picture Advertising Service Company, Inc., a corporation respondent herein, that the 11 th day of July A. D.1947, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a haring will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of law charged in the complaint.

You are notified and required, on or before the 20th day after service upon you of this complaint; to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure

to appear or answer (Rule VIII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

Failure of the respondent to file answer within the time above provided, and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all of the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer, the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief directed solely to that question, in accord-

ance with Rule XXIV.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts arguments, offers of settlement or proposals of adjustment where time, nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this

26th day of May A. D. 1947.

By the Commission:

Otis B. Johnson, (Otis B. Johnson), Secretary.

Before Federal Trade Commission

[Title omitted.]

Answer of respondent Motion Picture Advertising Service Company, Inc.

Received June 16, 1947

The respondent, Motion Picture Advertising Service Company, Inc., by Louis L. Rosen, its attorney, makes the following answer to the Complaint of the Federal Trade Commission dated May 26, 1947:

FIRST DEFENSE

Respondent avers that on March 19, 1942, the Federal Trade Commission filed complaint in the matter of "Screen-Broadcast Corporation, et al., Docket No. 4736" against this respondent and the other respondents therein named, and alleged in Paragraph Four, subparagraph (a) as follows:

"The respective respondent distributors entered into individual contracts with moving picture exhibitors for the

exclusive privilege of exhibiting commercial or advertising motion picture films in the theater or theaters owned or controlled by the said exhibitors for a specified period of time, usually for five years."

This respondent, Motion Picture Advertising Service Company,

Inc., answered said allegation as follows:

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"Respondents admit the allegations of subparagraph (a) of Paragraph Four of the Complaint, except that respondents deny that all such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary the vast majority of such contracts with motion picture theatres are non-exclusive in character, and respondents further deny that such contracts with

theatres are usually for a period of five years."

Respondent further avers that after a full and complete hearing upon this issue, the Federal Trade Commission refused to order this respondent (and the other respondents therein named) to cease and desist from entering into individual contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films for the theater or theaters owned or controlled by the said exhibitors. Accordingly, respondent avers that the only issue involved in this complaint, Docket No. 5498, has been fully and, finally determined in respondent's favor in proceedings had under the former complaint, Docket No. 4738 and, therefore, said issues is res adjudicata and, accordingly, this complaint should be dismissed.

SECOND DEFENSE

And now, with full reservation of the plea of res adjudicata, for answer to the allegations of said complaint respondent

Paragraph One. Respondent admits all of the facts alleged in

Paragraph One.

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Paragraph Two. Respondent admits all of the facts alleged in Paragraph Two, except that respondent denies that it is one of the largest producers and distributors of commercial or advertising films in the United States.

Paragraph Three. Respondent admits the facts alleged in

Paragraph Three.

graph Four except as herein specially admitted!

Further answering the allegations of said Paragraph Four, respondent avers that in or about the year 1937, and from time to time thereafter, said respondent has entered into screening agreements with various motion picture exhibitors under which each respective exhibitor agrees during the term of his contract to properly display for respondent on the screens of theaters listed in said contract the number of advertising films specified therein, and further agrees to display only advertising films furnished by respondent during the limited term of said contract, in considera-

tion whereof respondent pays the exhibitor at a stipulated rate for the service rendered by said exhibitor in displaying respondent's advertising films; that such an agreement is known and designated as "Theatre Screen Agreement," and

provides in part:

"The Exhibitor agrees to properly display for 'MPA' a maximum of six ads per performance per week, equal to not over three hundred sixty feet at a time, on the screens of theatres listed below, and at the rates per ad per week specified below. * * * 'MPA' will include with each shipment of film, screening instructions showing the names of the advertisers and the week during which films are to be displayed. Should an omission occur in the display, Exhibitor agrees to immediately notify 'MPA'; and further agrees to display only advertising films furnished by 'MIA', excepting films or slides for charitable or governmental organizations or announcements for Exhibitor's present and further attractions of the theatres."

Respondent avers that said contracts are legal in all respects.. Paragraph Five. Respondent denies the facts alleged in Para-

graph Five.

Further answering said paragraph, respondent avers that there are approximately 18,765 theaters operating in the United States with a total seating capacity of 11,400,000, and that respondent has exclusive theater screening agreements with only a small percentage of the theaters having a small percentage of the seating capacity. Respondent specially denies that its exclusive theater

screening agreements restrain, lessen, suppress, and injure competition in the interstate sale, lease, rental and distribution of commercial and advertising films, or hinder or prevent competing producers, sellers, and distributors of commercial and advertising films from selling, leasing, renting and distributing such films in the various states of the United States. Respondent avers that there is active and substantial competition among distributors in securing theater screening agreements with

shibitors. Respondent further avers that respondent encourges advertises to have their films produced by other producers, and respondent accepts for distribution and exhibition films prouced by other producers, subject only to the condition that such lms measure up to the standards required by the exhibitors. Recondent specially denies that advertisers and prospective adertisers have been compelled to place their business with recondent, or to forego this type of advertising, and avers that espondent has heretofore accepted and continues now to accept cone other film producers, and from advertisers or their adversing agencies throughout the United States booking orders for the exhibit of films for advertisers who desire their films prouced by others, and who desire to display said films on screens

nder exclusive contracts with respondent.

Paragraph Sixth. Respondent denies all of the allegations

intained in Paragraph Sixth.

Wherefore, respondent, Motion Picture Advertising Service ompany, Inc., prays that the Complaint against it be dismissed.

Louis L. Rosen,

Attorney for Respondent, Motion Picture Advertising Service Company, Inc.

Office and postoffice address of said attorney: 1801 Hibernia Bank Building, New Orleans, Louisiana.

Note re answer, brders, application and notices

Answer of Floyd O. Collins, to Application of Louis L. Rosen, tty., for Postponement of Hearing;

Order of Federal Trade Commission Postponing Commence-

ent of Hearings; Order of Federal Trade Commission appointing Frank Hier, rial Examiner;

Order dated 8/4/47 of Trial Examiner Setting Hearing for retrial Conference:

Application of Motion Picture Advertising Service Co., Inc.,

or Oral Argument on Plea of Res Adjudicata;

Order of Federal Trade Commission Rescinding Order of 27/47 and Directing the Commencement of Hearings to begin 19/29/47;

Notice of Trial Examiner to all Counsel relative to the Com-

Notice of Federal Trade Commission relative to time and place of Oral Argument on Plea of Res Adjudicata;

Authorities submitted by Counsel of Respondents to Federal Trade Commission, dated 9/20/47 re Pleas of Resulfudicata:

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25 Authorities submitted by Counsel supporting the Couplaint to Federal Trade Commission, filed 9/28/47, re Finings of Fact;

Order of Frank Hier, Trial Examiner canceling Hearings; Omitted from the Printed Record, pursuant to Petitioner's De

ignation as to Printing Record, copied at page 1.

Before Federal Trade Commission

[Title omitted.]

Order denying plea of res judicata

February 20, 1948

This matter came on to be heard in regular course upon the motion of September 9, 1947, by respondent for hearing upon its plea of res judicata, the answer to said motion filed September 12, 1947, by counsel supporting the complaint, and oral argument had before the Commission on said motion. Having duly considered the matter, and for the reasons stated in the

opinion filed herein:

It Is Ordered that respondent's plea of res judicata as a defense

in this proceeding be, and the same hereby is, denied.

By the Commission:

[SEAL]

Otis J. Johnson, (Otis B. Johnson),

Secretary.

Before Federal Trade Commission

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COM-PANY, INC., A CORPORATION.

Opinion on plea of res judicata

February 20 1948

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 20th day of February A. D. 1948. Commissioners: Robert E. Freer, Chairman, Garland S. Ferguson, Ewin L. Davis, William A. Ayres, Lowell B. Mason.

In its answer to the complaint herein respondent Motion 27 Picture Advertising Service Company, Inc., pleaded res judicata as a defense to this proceeding, contending that the issues herein were decided in Docket 4736, Screen Broadcast Corporation, et al.

The Commission is of the opinion that in a proceeding such as this the doctrine of res judicata is inapplicable. This view is based upon the provisions of the statute under which this proceeding is brought, the nature and character of proceedings by this Commission, and the primary importance of the interest of

the public.

In this case the decision is not rested on the general grounds stated above, for even if the principle were applicable the present plea would be without merit because the issues in this proceeding were not decided in Docket No. 4736. In the former proceeding Motion Picture Advertising Service Company, Inc., and a number of other respondents were charged with having entered into and carried out a combination and conspiracy which had the results of unreasonably restraining trade and commerce in commercial or advertising motion picture films and tending to create in said respondents a monopoly in the sale, lease, rental, and distribution of such films. Among the numerous overt acts alleged to have been done pursuant to and as a means of effectuating the purposes of such combination and conspiracy was the following:

The respective respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theater or theaters owned or controlled by the said exhibitors

for a specified period of time, usually for five years.

In the present proceeding respondent is individually charged with having entered into long-term screening arrangements with numerous motion picture exhibitors under which respondent acquired the exclusive privilege of exhibiting commercial or advertising films produced or distributed by it in the theaters owned or controlled by such exhibitors and under which each exhibitor agreed not to display commercial or advertising films other than those furnished by respondent. It is further alleged that the effect of said agreements is to suppress and injure competition in the interstate sale, lease, rental, and distribution of commercial or advertising films and unduly to hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting and distributing such films in commerce.

In the first proceeding the gravamen of the offense charged was the combination and conspiracy to do and the doing of centain 29

acts pursuant to such combination and conspiracy. The acts charged as a violation of law in the present proceeding are the individual acts of respondent not charged as having been done pursuant to any agreement or understanding with others. difference between the issues in the two proceedings is therefore apparent.

Respondent further contends, however, that if the issues created by the pleadings in Docket 4736 were not identical with the issues in the present proceeding, they were, nevertheless, made identical Socause counsel supporting the complaint in the first proceeding,

in his brief upon the merits, sought the issuance of an order to cease and desist which included a provision against any

respondent therein individually and without agreement with other respondents entering into contracts with motion picture exhibitors for the exclusive right of exhibiting commercial or advertising films in the theaters owned or controlled by such exhibitors. The provision contained in the order actually issued by the Commission prohibited respondents from entering into such contracts pursuant to agreement and understanding with any of their correspondents. In that proceeding the Commission could not lawfully have entered an order against the respondents individually. The Commission has sole authority under the statute to issue complaints stating its charges. The fact that an attorney supporting a complaint seeks, argues, or contends for some position does not alter or modify the issues originally tendered by the complaint and to which the Commission must adhere unless such issues are subsequently changed through affirmative action by the Commission amending the complaint.

Order denying respondent's plea of res judicata will be entered.

By the Commission:

Note re orders and notices

Order of Federal Trade Commission substituting Earl J. Kolb, Trial Examiner, and fixing time and place for Taking Testimony; Order of Earl J. Kolb, Trial Examiner, dated 3/12/48 postponing the Commencement of Hearings;

Notice of Earl J. Kolb, Trial Examiner, dated 3/16/48 of

Notice of Earl J. Kolb, Trial Examiner, dated 7/7/48 to Counsel of hearing:

Notice of Earl J. Kolb, Trial Examiner, dated 8/17/48 to Counsel of hearing:

Notice of Earl J. Kolb, Trial Examiner, dated 10/26/48 to

Counsel of/Hearings;

Order of Earl J. Kolb, Trial Examiner, Postponing Hearing. dated 12/28/48:

Order of Earl J. Kolb, Trial Examiner, Extending time for

filing Proposed Findings and Conclusions;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to Printing Record, copied at page 1.

Before Federal Trade Commission

[Title omitted.]

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Proposed findings and conclusions before trial examiner under Rule XXI of the Rules of Practice Before the Federal Trade Commission

Received March 14, 1949

Now comes Motion Picture Advertising Service Company, Inc., Respondent herein, and pursuant to Rule XXI of the Rules of Practice before the Federal Trade Commission requests the Honorable Earl J. Kolb, Trial Examiner in this proceeding, to make the following findings and conclusions, to wit:

Proposed findings of fact

1. On or about the 26th day of May 1947, the Federal Trade Commission, proceeding under Section 5 of the Federal Trade Commission Act, issued its Complaint herein in which, in substance, it charged the Respondent with engaging in unfair methods of competition by entering into long term exclusive screening agreements with various motion picture exhibitors, the tendency of which is unduly to restrain competition in interstate commerce and to monopolize the distribution of commercial or advertising films in such commerce.

(Note.—Figures in parentheses refer to pages of the

record in Docket No. 5498.)

2. Respondent duly answered the Complaint alleging as a First Defense that the issue presented is "res judicata" on the ground that the same issue between the same parties was presented in the matter entitled: "Screen Broadcast Corporation, et al.," Docket No. 4736, against this Respondent and the other Respondents therein named. In Paragraph Four, subparagraph (a) of the Complaint in said proceeding, the Federal Trade Commission

"The respective Respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

This Respondent in proceeding No. 4736 answered said allega-

tion as follows:

"Respondents admit the allegations of subparagraph (a) of Paragraph Four of the Complaint except that Respondents deny that all such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary the vast majority of such contracts with motion picture theatres are nonexclusive in character, and Respondents further deny that such contracts with

theatres are usually for a period of five years."

In connection with said plea of "res judicata," Respondent further averred in its answer in this proceeding, that after a full and complete hearing in proceeding 4736 upon this issue the Federal Trade Commission refused to order this Respondent (and the other Respondents therein named) to cease and desist from entering into individual contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films for the theatre or theatres owned or controlled by the said exhibitors, and, accordingly, that the only issue involved in this Complaint, Docket No. 5498, has been fully and finally determined in Respondent's favor in proceedings had under the former Complaint, Docket No. 4736 and, therefore, that said issue is "res judicata," and that this Complaint should be dismissed.

As a Second Defense in its answer, Respondent denied that the capacity, tendency and effect of exclusive theatre screening agreements have been to unduly restrain, lessen, suppress and injure competition or to create in Respondent, or tend to create, a monopoly in the sale, lease, rental and distribution of commercial or advertising films in commerce; or that the acts and practices of Respondent are to the prejudice of competitors of Respondent, or to the prejudice of the public. Respondent specially denied that its acts or practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the

Federal Trade Commission Act.

34 The plea of "res judicata" was overruled by the Commission, and the case thereupon tried on its merits.

3. Testimony and other evidence were introduced by the Commission and the Respondent before a duly designated Trial Examiner, and such testimony and evidence were duly recorded and filed in the office of the Commission.

4. Respondent is a corporation which was organized under the laws of the State of Louisiana in September 1921, with its office and principal place of business in New Orleans, Louisiana (565).

5. From September 1921 to June 1925, the Company acted as a distributor of advertising films. In June 1925, Respondent organized its own studio and became a producer of films, and since that time has been engaged in the business of producing, selling, leasing, renting and distributing motion picture advertising films to or on the order of advertisers and other distributors of motion picture advertising films, and furnishing a display service by causing the exhibition of such films in theatres under screening agreements between Respondent and theatre owners: Respondent does business in 28 states (565).

6. Before the advent of motion picture advertising, theatres exhibited advertising on "drop curtains" which were lowered between performances or between acts. On these curtains were painted advertisements which produced a supplementary source of

income to the theatres, the privilege of placing advertise-35 · ments thereon being leased or let to some one sign company.

or painter (566). Advertising on theatre screens has developed from the original use of slides to black and white short films without life action or animation or sound, seasonal films, short life action films, reader type or tintype pictures, to the present standard practice, which consists of the exhibition of 35 mm. life action or cartoon animation (or a combination of both) in black and white or color, with sound accompaniment (370-373: 565-566).

· 7. There are in the United States at least 28 producers and distributors of 35 mm. film advertising playlets, and at least 265 producers (who are not distributors) of 35 mm. film advertising playlets (Alexander Film Company's Exhibits 5 (a) to 5 (i)

inclusive, and Exhibit 6) (488).

8. The motion picture advertising business is divided into three categories, namely, local advertising, manufacturer-dealer or advertising (448-456) and national advertising cooperative (456-458).

9. Local advertising consists of the exhibition of screen films for local merchants in local theatres, and the films used for this

purpose are known as "library films" (514, 568, 578).

10. Manufacturer-dealer or cooperative advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications, and the costs of production of the playlets, including the master film or negative, and the prints are borne by the manufacturer; and the cost of exhibiting the films

is usually borne by the manufacturer or, is shared by the manufacturer and his dealers, the manufacturer's distribu-36 tors (modelemen between the manufacturer and his dealers)

also sometimes sharing in distribution costs (448-457).

11. National advertising is national er regional in scope and consists of playlets produced to the manufacturer's specifications, the costs of production and exhibition of which are borne exclu-

sively by the manufacturer (457-460).

12. Library films for local advertising consist of a series of playlets advertising various lines of business. Respondent carries in its library a stock of films that advertise forty lines of business. These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business. Since these films are not specialized for any particular advertiser, they are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets. Library film is a playlet 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. The name trailer is 20 feet in length and the over-all length of the film is 60 feet, the screening time of which is 40 seconds. Within the territory in which Respondent operates, its sales force regularly calls upon local advertising customers and offers to them its library film advertising service. Respondent's contracts with local advertisers call for the display of particular library films on designated theatre screens under contract with Respondent, usually on a weekly or alternate weekly basis for a period of one year but in no instance for less than thirteen weeks (439, 514, 577, 578).

13. Specially produced films for manufacturer-dealer or cooperative advertising programs advertise merchandise, products, and service of a national manufacturer. They are playlets 40 feet in length, in black and white color, with life action or cartoon animation (or a combination of both) and sound accompaniment; and to the playlet is added a 20-foot trailer depicting, among other things, the name of the dealer who is identified with the advertising message in his particular trade area. · The over-all length of the film is 60 feet and the screening time is 40 seconds. These specialized films and playlets may or may not be produced by Respondent. Customarily, the manufacturer deals with one distributor in arranging for the initiation and execution of the advertising campaign, but not always. Usually, the distributor selected by the manufacturer is not alone able to provide the advertiser with the full coverage that he desires. Accordingly, the originating distributor who has the contract with the manufacturer enlists the aid of other distributors who have available theatre outlets. Through rate books, or other sources of information, the originating distributor knows of the theatres available throughout the territory to be blanketed by the advertising program, and of the theatre screening rates, and knows

further that a fair average of such other theatres will be prepared to exhibit the playlets. When the originating distributor has in hand the required information respecting the coverage that he can assure and of the overall costs of exhibition, he reports to the manufacturer or advertising agency, receives approval, and proceeds to execute the program. The originating distributor's salesmen and the salemen for the codistributors sell the program to the advertiser's dealers for use in the theatres

program to the advertiser's dealers for use in the theatres where the respective distributors have screening rights, and in due course the program is launched in this widespread territory. The number of dealers may be as many as 5,000, and a substantial portion of the dollar volume of the motion picture advertising business is executed through these manufacturer-dealer or co-

operajtive programs (409-411, 515).

14. Specially produced films for national advertising are playlets that advertise the merchandia, products, and service of a national manufacturer that may be handled by numerous retailers in a given trade territory, and hence it is impracticable for the retailer to participate in the distribution costs. Usually, the playlets do not carry any dealers' name trailers. The playlets are 90 feet in length (minute movies), but may run to 120 or 130 feet, are in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. Respondent is a distributor of this type of advertising through the theatres which it has under contract, and the national advertiser or its advertising agency has available a list of theatres under contract with Respondent and a schedule of Respondent's screening rates. Most of the advertising playlets are produced by concerns other than Respondent (411, 516-518).

15. Respondent's business is divided into five departments:

(a) A Production Department that produces a library or syndicated service and also special films ordered by particular advertisers;

(b) A Service Department whose responsibility is to ship the films to the theatres and receive them back from the

heatres;

(?) An Accounting Department which keeps all of the records of the Company:

(d) A Sales Dapartment which handles the sale of advertising;

(e) A Theatre Procurement Department which handles the securing of theatre screening privileges with theatres (568-569).

16. The film libraries represent substantial investments, Alexander Film Company's running to about three-quarters of a million dollars. The annual cost of library production of Respondent

runs to more than \$300,000 (578). The libraries are kept current to changes of style and these recurrent outlays run into substantial sums. The cost of producing a black and white negative is from \$2.00 to \$3.00 per foot, and a color negative approximately double that amount (407). Prints cost approximately 3 cents a foot for black and white, and double that amount for color (408). The cost of manufacturer-dealer playlets for a year's display may run to several thousand dollars (1111).

17. Theatre screening agreements made between Respondent and various theatres are divided into two general classes: non-exclusive contracts and exclusive contracts. Under a nonexclusive

contracts and exclusive contracts. Under a nonexclusive contract the screen is open to more than one distributor at the same time; whereas, under an exclusive contract, only

one distributor is permitted to show advertising on the theatre screen during the term of the contract (except that the theatre will generally run out to completion advertising contracts of other distributors which have been sold to the advertiser previous to the execution of the exclusive contract). Respondent in common with other film advertising distributors has, from the very beginning of the industry (596), solicited and obtained some exclusive theatre screening agreements for reasonable periods of time, the term ranging from one to a maximum of five years (568–570).

18. Respondent must have a nucleus of exclusive screening agreements with theatres in order to sell to local advertisers its library film service (577-578).

19. Respondent must have a nucleus of exclusive screening agreements in order to sell manufacturer-dealer or cooperative

programs (515-516).

20. Respondent must have a nucleus of exclusive theatre screening agreements in order to sell national advertising programs

(820-821; 1100-1103).

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21. Respondent must have a fairly representative number of assured theatre outlets to justify its large investments in libraries of films, in the large periodical outlays for keeping its library films current, and in the large costs represented by its productive and promotional organization. It must assure screening space for its customers and to that end must have a nucleus of theatre outlets for service where and when required, time often being very much of the essence (550, 578, 619).

22. Because of prohibitive costs it is not economically advantageous for a local merchant to have a special playlet

made for his individual use (1102).

23. A film ad distributor cannot run the risk inherent in a guardanty of minimum revenue to the theatre owner without securing a compensating right of availability of theatre screens (735-736).

24. Film advertising contracts should run for at least a year to produce the desired cumulative advertising impressions (406–407). A year's advertising contract has thus become standard practice (406–407). While actual exhibitions of an advertiser's program may be on a weekly basis, biweekly showings are common, although exhibitions every third or fourth week are not uncommon. Advertising contracts limited to 13 weeks are becoming something of a rarity, a "teaspoon taste" (406). And in order for the advertising campaign to be effective there is generally a follow-up campaign after the expiration of the first year's advertising contract (855).

25. Between the taking of an advertising contract, particularly a manufacturer-dealer or cooperative contract, and the beginning of the screening of the advertising, several months must elapse for the production and approval of the advertising film, the solicitation of dealers and the allocation and coordination of screen

time (853).

26. It is standard practice to allow a distributor to run out its advertising (which has been sold to the advertiser prior to the expiration of its theatre screening agreement) after the ex-

piration of the old theatre contract, and thus its successor finds that only a fraction of the screen space for which it has contracted will be available for several months after the new contract term commences (853). A screen is not fully available until fourteen to fifteen months after the commencement of the contract (1115). On a library service, it takes about sixty days to get the local advertiser's contract started. Moreover, many types of advertising, especially of national advertising (including manufacturer-dealer programs) are not screened until after the lapse of several months succeeding the making of the advertising agreements. In these cases, it takes six months to produce the special film, and to contact dealers of the manufacturer (1116–1117).

27. Respondent has two general types of theatre screening contracts shown in the record as Commission's Exhibits 21 and 22 (335). The forms of contract contain the exclusive clause and contain the words "five years" as to the term of the contract, but in cases where the contract is nonexclusive, the exclusive clause is deleted, and in cases where the term is less than five years, the word "five" is stricken and the appropriate word is inserted in its place (573).

28. In Amuary of 1925 Respondent had theatre screening agreements with 300 theatres in the States of Mississippi, Louisiana and a part of Alabama. In January of 1945 Respondent had theatre creening agreements with 3,000 theatres in twenty-eight states, and between January 1945 and the Summer of 1948, Respondent

obtained theatre screening agreements with an additional 1,500 theatres. During 1948 contracts with more than 3,000 theatres expired. An average of about one-third of the theatre screening agreements expire each year (572-573).

29. There were approximately 20,306 theatres in the United States on August 1, 1947, and about 12,676 exhibited film advertising. At that time Respondent had agreements with 4,096, of which 2,493 contained the exclusive clause. The term of the agreements runs from one to a maximum of five years (Commission's Exhibit 1) (575-576).

30. There is free, open, active and substantial competition among film advertising distributors for the securing of theatre screening agreements. Theatres frequently change distributors at the termination of contracts. There is also free, open, active and substantial competition in the acquisition of advertising contracts

and in the production of advertising films (578-579).

31. Respondent, in line with common practice, makes its screens available to competing film distributors; provided, only, that the screens shall not be loaded beyond the extent permitted by the theatres, that the films shall be of standard length, and that the quality of films shall meet the standards of the theatres (603-617). In such instances Respondent pays a standard American Association of Advertising Agencies' commission of 15% plus 2% cash discount (605).

32. Screening space is severely limited. Thus, out of some 20,306 motion picture theatres in the United States, about

44 40 per cent do not accept film ads (Commission's Ex. 1).

Motion picture shows commonly are limited to two per day

Motion picture shows commonly are limited to two per day, with a possible matinee on Sunday, and the shows run for two to two and a half hours. Theatre patrons, potential customers of the advertisers, who pay admission for entertainment, resent the showing of too much film advertising, and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes, or, from two per cent to four per cent of the time consumed by each show. In this respect motion picture advertising differs radically from newspaper and magazine advertising, which is limited only by the availability of newsprint and normally occupies some 60 per cent of the overall newspaper or magazine space, and differs materially from radio advertising, which may allow 20 per cent of radio time for commercials (1098-1100).

33. Film advertising affords the theatre owner a desirable source of extra revenue, and furnishes advertisers a highly effective medium for the promotion and sale of their products and services (449, 766).

a

. 34. Owners of many theatres insist upon limiting theatre screen advertising to one distributor.

. 35. Many theatres enter into exclusive screening agreements with film advertising distributors for the following reasons, to wit:

- (a) To afford better control of theatre screens as respects audience acceptance, and as respects confusion, chaos and revenue loss from a screen overload one week, and a screen underload the rext week.
 - (b) To prevent misunderstandings with advertisers.

(c) To enhance screen rentals.

(d) To eliminate complicated bookkeeping procedure.

(e) To enable theatre owners to control film advertising through reliable distributors who will give sufficient service and promptly pay their bills.

(f) To enable theatre owners to control the quality of the ad-

vertising films shown on their screens.

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(g) To enable theatre owners to insist upon minimum guarantees (639-656) (656-667) (667-680) (718-741) (741-753) (753-768) (788-793) (842-852) (884-907) (907-926) (950-968) (1010-1028) (1028-1035) (1043-1049) (1049-1053) (1065-1085) (1085-1096).

36. The quality of advertising films is a very important competitive factor in the firm advertising business (878884).

37. Respondent's competitors who testified on behalf of the Commission have lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of the inferior quality and character of their films, their lack of sales organization, and their failure to pay the theatres in accordance

with their contracts (680-700) (968-989).

38. Many theatre owners would rather forego the sup-46 plementary source of income derived from screen advertising if required to exhibit films for more than one distributor at the same time (1072) (1034).

39. National advertisers and their advertising agents could not use the medium of screen advertising unless they were assured of space for the display of their special films manufactured at considerable cost to the manufacturer (1096-1112).

40. No film advertising distributor has ever succeeded in business without some exclusive theatre screening agreements (607).

Proposed conclusions

1. That the Federal Trade Commission does not have prisdiction in these proceedings because the securing of theatre screening agreements does not involve interstate commerce.

2. That the Federal Trade Commission does not have jurisdiction in these proceedings because the interest of the public is not involved within the meaning and intent of Section 5 of the Federal Trade Commission Act.

3. That Respondent's plea of "res judicata" should have been sustained, because of the Confmission's prior adjudication of the

sole issue involved herein, in Docket No. 4736.

4. That Respondent, in common with other film advertising distributors since the beginning of the industry, has entered into exclusive theatre screening agreements running for a term of from one to a maximum of five years.

5. That the film advertising business cannot be successfully a conducted without some exclusive theatre screening agreements.

6. That there is open, free, active and substantial competition in the solicitation and acquisition of theatre screening agreements and the renewals thereof.

7. That those theatre owners or exhibitors who enter into exclusive theatre screening agreements are not willing to license their screens for the exhibition of motion picture advertising films to more than one distributor at the same time.

8. That the length of time of Respondent's theatre screening agreements are not longer than business necessity requires, and

are therefore reasonable.

V. That the evidence herein is insufficient to sustain the allega-

tions of the Complaint.

10. That Respondent's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not constitute an unfair method of competition in commerce, and the interest of the public is not involved, within the meaning and intent of Section 5 of the Federal Trade Commission Act.

11. That Respondent's exclusive theatre screening agree-

ments with motion picture theatres for the display of film advertising do not unduly restrain, lessen, suppress, or injure competition in the interstate sale, lease, rental or distribution of advertising films, and do not unduly hinder or prevent competing producers, sellers and distributors of advertising films from selling, leasing, renting or distributing such films, and do not monopolize in said Respondent the sale, lease, rental or distribution of advertising films in commerce.

12. That Respondent's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not have a tendency to hinder or prevent and have not actually hindered or prevented competition in the sale, leave, rental or distribution of advertising films in commerce, with the meaning and intent of the Federal Trade Commission Act; and have not unreasonably restrained such commerce in advertising films, and

do not have a tendency to create in Respondent a monopoly in the sale, lease, rental or distribution of such films, and do not constitute unfair methods of competition in commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act.

13. That the Complaint herein is dismissed.

Reasons and authorities sustaining the proposed findings and conclusions

Conclusion 1: (a) Exhibition of motion picture films is intractional state business.

9 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230; 59 L. Ed. 552,

Boynton v. Fox West Coast Theatre Corp., 60 Fed. (2d) 851, Tad Sereen Advertising Co. v. Oklahoma Tax Commission, 126 Fed. (2d) 544, even where interstate commerce is incidentally affected.

Foster & Kleiser Co. v. Special Site Co., 85 Fed. (2d) 74%, Cer-

Lipson v. Socony-Vacuum Corp., 87 Fed. (2d) 265.

Moore v. New York Cotton Exchange, 270 U. S. 593; 70 L. Ed.

Jewell Tea Co. v. Williams, 118 Fed. (2d) 202.

(b) The relationship between the Respondent and the theatre owners is one of agency, and hence subject to exclusive contracts, Federal Trade Commission v. Curtis Publishing Co., 260 U. S.

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568; 67 L. Ed. 408,

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 229 U. S. 3; 81 L. Ed. 46

Brosius v. Pepsi Cola Co., 155 Fed. (2d) 99, or a permissible exclusive lease of screen space.

U. S. v. Western Union Tel. Co., 53 F. Supp. 377,

Goldberg v. Tri-States Theatre Corp., 126 Fed. (2d) 26.

Conclusion 3. The doctrine of res judicata is applicable to administrative proceedings of the Federal Trade Commission.

U. S. v. Willard Tablet Co., 141 Fed. (2d) 141. Lee v. Federal Trade Commission, 113 Fed. (2d) 583.

And see briefs considered by the Commission on motion for dismissal.

Conclusions 2, 10, 11 and 12 go to the merits of the case in the light of the Record evidence. Authorities in support of these four Conclusions may be classified as follows:

(A) EXCLUSIVE CONTRACTS ARE NOT ILLIGAL PER SE.

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 299 U. S. 3; 81 L. Ed. 4.

Moore v. New York Cotton Exchange, 270 U.S. 593; 70

L. Ed. 750.

U. S. v. Columbia Steel Cor., 92 L. Ed. 1173, 1188, 1189, 1191,

(b) Hence are illegal only if they operate in unreasonable restraint of trade or tend unduly toward monopoly.

51 Standard Oil Co. v. U. S., 221 U. S., 1; 55 L. Ed. 619. Fashion Originators Guild v. Federal Trade Commission.

312 U.S. 457; 85 L. Ed. 949.

(c) The terms "restraint of trade" and "monoply" are used in the Sherman Act in their common-law connotation.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 497-499, 84 L. Ed.

1311, 1325-1327.

(d) The reasonableness of Respondent's challenged practices depends upon all of the facts and circumstances that constitute the background of the practices.

Sugar Institute, Inc. v. U. S., 297 U. S. 553; 80 L. Ed. 859.

Appalachian Coals, Inc. v. U. S., 288 U. S. 344; 77 L. Ed. 825.

Board of Trade v. U.S., 246 U.S. 231: 62 L. Ed. 683.

Gary Theatre Co. v. Columbia Pictures Corp., 120 Fed. (2d)

Westway Theatre v. 20th Century-Fox Film Corp., 30 F. Supp.

830. Aff. 113 Fed. (2d) 932.

(e) A trader may select the persons with whom he will deal, and, in the absence of a purpose to restrain or monopolize business, the terms upon which he will deal with them.

U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 290;

41 L. Ed. 1007.

Eastern States Retail Lumber Dealers Ass'n. v. U. S., 234 U. S. 600; 38 L. Ed. 1490.

U. S. v. Colgate Co., 250 U. S. 200; 63 L. Ed. 992.

Federal Trade Commission v. Gratz, 253 U. S. 421; 64 L. Ed. 993.

(f) The Findings of Fact submitted in the foregoing proposals, fully supported by the Record, establish the following reasons justifying the taking of theatre contracts that are exclusive for limited reasonable periods of time:

First. The solicitation and acquisition of theatre screening contracts, and the renewals thereof, and of film advertising contracts,

are highly competitive activities.

Second. Unless motion picture advertising business is to be outlawed in its essential functions, the taking of a fairly representative nucleus of exclusive screening contracts is necessary. Third, The terms of Respondent's theatre screening contracts are not longer than business necessity dictates for the execution of an effective advertising program.

· (g) The foregoing facts establish that Respondent's practices as respects exclusive theatre screening contracts,

and the duration thereof, are reasonable under authorities

classified as follows:

First. Covenants of the seller not to compete with his buyer for a reasonable time within the buyer's trade area.

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179; 50

L. Ed. 428.

53

Darius Cole Transportation Co. v. White Star Line, 186 Fed.

U.S. v. Paramount Pictures, 66 F. Supp. 323, 841.

Second. Covenants of an employee not to compete with his employer for a reasonable time and within a reasonable area after his employment ceases.

Mark v. Ervin Press Corp., 48 Fed. (2d) 152.

Bausch & Lomb Optical Co. v. Wahlgren, 1 Fed. Supp. 799.

Third. Covenants of a landlord not to allow a competitor of his tenant to carry on a business competitive with the business of the tenant in the building in which the tenant leases quarters.

Goldberg v. Tri-States Theatre Corp., 126 Fed. (2d) 26.

U. S. v. Western Union Tel. Co., 53 F. Supp. 377.

Fourth. Exclu ive sales agencies.

Federal Trade Commission v. Curtis Publishing Co., 260

U. S. 568, 580; 67 L. Ed. 408, 413.

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 299 U. S. 3; 81 L. Ed. 4.

Brosius v. Pepsi-Cola Co., 155 Fed. (2d) 99.

Fifth. Exclusive dealer agreements requiring the dealer to handle the distributor's products in dispensing equipment furnished by the distributor.

Federal Trade Commission v. Sinclair Refining Co., 261 U. S.

463; 67 L. Ed. 746.

Standard Oil Co. v. Federal Trade Commission, 273 Fed. 478. Lipson v. Socony-Vacuum Corp., 87 Fed. (2d) 265.

Sixth. Motion picture "clearance cases."

Schine Chain Theatres v. U. S., 92 L. Ed. 871: 874 Note 6.

U. S. v. Paramount Pictures, Inc., 92 L. Ed. 883, 892, Note 6.

Westway Theatre Inc. y. 20th Century-Fox Film Corp., 30 F. Supp. 830. Aff. 113 Fed. Od) 32.

Seventh. Miscellaneous cases.

(i) Chicago, St. Louis & N. O. R. R. Co. v. Pullman Southern Car Co., 139 U.S. 79; 35 L. Ed. 97; 55 (ii) Donovan v. Pennsylvania Co., 199 U. S. 279; 30 L. Ed. 192, (Still recognized as good law—U. S. v. Yellow Cab Co., 322 U. S. 218, 229, 91 L! Ed. 2010, 2019).

(iii) Moore v. New York Cotton Exchange, 270 U. S. 593,

70 L. Ed. 750.

(iv) Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 229 U.S. 3; 81 L. Ed. 4.

(v) U. S. v. Western Union Tel. Co., 53 F. Supp 377.

The "Proposed Findings and Conclusions" submitted by Respondent set forth the issues and the material facts proved by the record.

The sole issue presented in this matter is whether soliciting and obtaining exclusive theatre screening agreements by motion picture advertising distributors constitute an unfair method of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act, and, as such, whether the prevention of such method is in the interest of the public in that it (a) unduly restrains competition; or (b) has created or fends to create in Respondent a monopoly.

There is no charge in the Complaint of any combination or conspiracy. The only charge is that Respondent has individually

been guilty of an unfair method of competition.

In Federal Trade Commission v. Raladam Company, 283

U. S. 643, 646, the Court said:

"By the plain words of the Act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

Conceding "arguendo" that the solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, we respectfully submit that the Commission has failed to establish that the methods are unfair, or that the preven-

tion thereof would be in the interest of the public.

The facts establish the following conclusions:

1. That Respondent, in common with other film advertising distributors, has, from the very beginning of the industry, solicited and obtained exclusive theatre screening agreements for reasonable periods of time;

2. That the solicitation and acquisition of theatre screening agreements by Respondent have been in open and free competition;

3. That unless the motion picture advertising business is to be outlawed in its essential functions, the acquisition of some ex-

clusive theatre screening agreements is necessary because
(a) Advertisers, whether they be local, national, or
regional, must be definitely assured of screen space and

time for the distribution and exhibition of their advertising films.

(b) Local advertising will disappear unless distributors can furnish syndicated service through the production of library film.

(c) Film advertising distributors cannot afford the large investments necessary to produce library film and for the renewals and upkeep thereof, and for the necessary organizational and promotional setups, unless they are assured of a market for their products through exclusive theatre screening agreements.

(d) Distributors cannot afford to yield to the importunities of theatre owners as respect minimum guaranteed revenue without

a compensating assurance of exclusive screening rights.

(e) Non-exclusive theatres whose screens are open to all distributors tend to become chaotic in respect of the film advertising business, since unlimited access to their screen results in too few or too many advertisements at each performance; in the display of competetive advertisements at the same performance, to the disaffection of advertisers, the annoyance of theatre patrons, and the chagrin of theatre owners; and in the general loss of control of the business by the theatre owners, and of the revenue accruing therefrom.

4. That the terms of Respondent's theatre screening agreements are not longer than business necessity dictates for the execution of effective advertising programs;

5. That Respondent, acting independently of its competitors, has undertaken to negotiate theatre screening agreements with theatre owners in the ordinary course of business without deception misrepresentation, or oppression, at fair prices, and in open and free competition;

6. That exclusive theatre screening agreements do not unduly

restrain, lessen, suppress, or injure competition;

7. That exclusive theatre screening agreements have not hindered or prevented competition in the selling, leasing, renting and distributing of commercial or advertising films in commerce, and have not resulted in creating in Respondent a monopoly, and have not a dangerous tendency to create in Respondent a monopoly;

8. That the soliciting and obtaining of exclusive theatre screening agreements do not constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the

Federal Trade Commission Act; and

9. That the prevention of the use of exclusive theatre screening agreements is not in the interest of the public.

Since the beginning of the motion picture advertising fill industry, distributors have sought and obtained exclusion theatre screening agreements as a necessary market for the

product. Without theatre space, the industry cannot exist The record abundantly establishes the fact that theatre screening space for advertising films is limited to from three to see the second space.

advertisements per performance.

The division of this screen space is impossible in those theath which grant exclusive contracts because the theatre owner came legally be prevented from choosing the distributor with which is willing to do business. The deletion of the word "exclusive in the contract could not possibly bring about the result soughly the Complaint. Even without an exclusive contract, to theatre owner could, from an operating point of view, limit to use of the screen to one distributor at a time, simply by not a cepting advertisements from others. No cease and desist ord would have the effect of forcing theatre owners to divide the available screen time for advertising between various distributors.

• In order for the theatre to maintain the proper and necessal measure of control over the screen, it is necessary that the distributor handling film advertising be reliable, both as to the quality of the film displayed, and financially. The theatre owner is not willing to display any quality of advertising on his screen. In needs assurance that the consideration of the contract will, promptly paid.

Many of the theatre owners who testified in this case stated the they would rather forego the supplemental income derived fro screen advertising if they were required to do business with mo

than one distributor at the same time.

That the theatre owner has the legal right to choose t distributor with which he will do business needs dittle cit tion of authority. In Moore v. New York Cotton Exchange, 2 U. S. 593, 606, the Court said:

"It has long been settled by this Court that under such circumstances a trader or manufacturer engaged in a purely privatusiness may freely exercise his independent discretion in respectof the persons with whom he will deal and to whom he will set the set of the persons with whom he will deal and to whom he will set the set of the persons with whom he will deal and to whom he will set of the persons with whom he will deal and to whom he will set of the persons with whom he will deal and to whom he will set of the persons with whom he will set of the persons with the set of the persons with the

All distributors alike, from the very beginning of the industributors alike, from the very beginning of the industributor and obtained exclusive theatre screening agreement. This method of doing business is not some new scheme adopt by Respondent to stifle competition. It is abundantly establish

by the record that exclusive theatre screening agreements a necessary to the operation of the business.

In Federal Trade Commission v. Gratz, 253 U. S. 421, 427, to

Court said:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the Courts, not for the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals * * * or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

The Complaint contains no intimation that Respondent did not properly obtain exclusive theatre screening agreements. So far as appears, acting independently of their competitors, Respondent undertook to negotiate these contracts with theatre owners in the ordinary course of business, without deception, misrepresentation, or oppression, at fair prices, and in open and free competition. As stated in Federal Trade Commission v. Gratz, supra, at page 426:

. "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business

methods must be preserved."

We submit that the solicitation and acquisition of exclusive theatre screening agreements for terms of from one to five years do not constitute an unfair method of competition.

We furthermore submit that the prevention of the use of this

method would not be in the interest of the public.

In Federal Trade Commission v. Raladam Company, supra

at page 647, the Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

The history of the industry has proved that there has always been, and is now, a fair opportunity between distributors for the solicitation and securing of theatre screen-

ing agreements.

It is to the decided interest of the public that the business be conducted in such a way as to be economically practicable. Advertisers cannot possibly use this limited medium without definite assurance of the theatre space and time available. No distributor has ever succeeded without some exclusive theatre screening agreements. We therefore, submit that it is not in the interest of the public to prevent the use of the only method which has been proved to be economically sound and practicable.

The issue in the present case is simply this: Does the practice of soliciting and acquiring exclusive theatre screening agreements

basis.

required by the exigencies of motion picture advertising and limited in duration to the necessities of the business, operate as an unreasonable restraint of trade, or tend unduly to build up in

Respondent a monopoly? Since the record negatives any suggestion of a scheme to control

prices, or of a calculated design to restrain trade or create a monopoly, the sole issue is whether this practice is unreasonable under the circumstances disclosed by the record. Reasonableness being the issue, it is obvious that the facts which are the background of this practice, and the motivating considerations thereof, are relevant to the proper determination of the question. . Each

case depends upon its own facts. Thus, in Sugar Institute v. United States, 297 U. S. 553, 600,

Chief Justice Hughes said:

"We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts Questions of reasonableness are necessarily questions of relation

And, in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 361, the Chief Justice used the following language:

The restrictions the Act imposes are not mechanical or arti-Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and trustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound

"In applying this test, a close and objective scrutiny of par ticular conditions and purposes is necessary in each case. Reali ties must dominate the judgment: The mere fact that the partie to an agreement eliminate competition between themselves, is no enough to condemn it.

"It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of make ing sales, the reasons which led to its adoption, and the probabl consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

As Mr. Justice Brandeis said in Board of Trade v. United States,

246 U.S. 231, 238, 239;

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention willsave an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and

purpose of the Call rule and in later excluding evidence. on that subject. But the evidence admitted makes it clear 65 that the rule was a reasonable regulation of business con-

sistent with the provisions of the Anti-Trust Law."

That exclusive theatre screening agreements are necessary to do business, and that the policy of an open screen available to more than one distributor at the same time, is disadvantageous to the theatre owner, the advertiser, the distributor and the public, are clearly brought out in the record by the cross-examination of the Commission's own witness, W. B. Reichart, who testified:

"A. I would say, for my experience over these years, which are seven or eight, that it is disadvantageous to every one concerned.

. "Q. For what?

"A. For a position to exist where a theatre has more than one contract with distributors,

"Q. Do I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous for all concerned-meaning everybody-the theatre and the distributor?

"A. And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought

it, in fact" (Tr. 244).

If an open screen policy would be disadvantageous to all@oncerned, how can it possibly be argued that the policy of exclusive theatre screening agreements is unreasonable?

In order to consider this case properly, the nature of the exclusive theatre screening agreement must be analyzed.

A theatre screening agreement is merely a contract of

agency under which the film advertising distributor appoints a theatre as its agent to exhibit film advertising for the distributor. Under an exclusive theatre screening agreement the theatre agrees that in consideration of the contract it will not act as an agent for any other distributor in the exhibition of advertising

films during the life of the contract.

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In practically all businesses manufacturers and merchants have the legal right to appoint agents to represent them, subject to the condition that the agent will not distribute the products of others. Just such an issue was presented in Federal Trade Commission v. Curtis Publishing Co., 250 U. S. 568, where the Commission sought to obtain a cease and desist order against Curtis Publishing Co. to prevent its entering into contracts with news dealers whereunder the dealers were appointed exclusive agents to distribute the weekly and monthly periodicals of Curtis Publishing Co., subject to the condition that the dealers would act exclusively for Curtis Publishing Co., and would not distribute the periodicals of any competitor. In holding that an exclusive agency agreement was lawful, and that the cease and desist order should be set aside, the Supreme Court of the United States said at pages 581 and 582:

"The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evi-

dence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow

because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

That case presents an exact parallel to the case at bar. There, Curtis Publishing Company entered into agreements with news

dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, Respondent enters into agreements with theatres whereunder the theatres are appointed as exclusive agents of Respondent to distribute the advertising films of their principal, subject to the condition that the agents will not, during the life of the contract, distribute the advertising films of competitors.

We submit that the principle announced in the Curtis 68 case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive. does not constitute an unfair method of competition, and affords no ground for condemnation under the statute.

For the foregoing reasons, we respectfully submit that the Complaint should be dismissed.

Respectfully submitted.

Attorney for Respondent, Motion Picture Advertising Service Company, Inc.

Before Federal Trade Commission

Order closing proceedings

Received April 28, 1949

[Title omitted.]

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The Trial Examiner having issued his order dated January 17, 1949, allowing the parties fifteen (15) days within which to file motions for reconsideration in reversal of rulings as provided by Rule XX and thirty (30) days within which to file proposed findings and conclusions as provided by Rule XXI, and

It appearing that no motions for reconsideration and reversal

of rulings were filed by either party, and

It further appearing that the time within which the parties were to file proposed findings and conclusions was on February 2, 1949, extended to and including March 15, 1949, and

It further appearing that proposed findings and conclusions have now been filed by the attorneys for the respondent,

It is Hereby Ordered that the proceedings herein be and the same are hereby closed.

Earl J. Kolb, (EARL J. KOLB),

Trial Examiner.

Washington, D. C., April 26, 1949.

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Copies to Floyd O. Collins, Esq., Attorney, Federal Trade Commission. Louis L. Rosen, Esq., Rosen, Kammer, Wolff, Hopkins & Burke, Hibernia Bank Building, New Orleans 12, Louisiana.

2 Before Federal Trade Commission

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., A CORPORATION

Trial examiner's recommended decision

Received May 31, 1949

Before: Earl J. Kolb, Trial Examiner. Appearances: Floyd O. Collins and Lewis F. Depro, Attorneys in support of the complaint; Louis L. Rosen of Rosen, Kammer, Wolff, Hopkins & Burke, Attorney in opposition to the complaint.

I. Proceedings

This is a proceeding under Section 5 of the Federal Trade Commission Act wherein the Commission issued its complaint on the 26th day of May 1947 against Motion Picture Advertising Service Company, Inc., a corporation, which in substance charged the respondent with engaging in unfair methods of competition in commerce by entering into long term exclusive screening agreements with various motion picture exhibitors the capacity, tendency and effect of which was to unduly restrain and restrict competition in violation of the provisions of Section 5 of said Act.

Answer was filed June 16, 1947.

Con August 4, 1947, Frank Hier was appointed Trial Examiner by the Commission, and thereafter on September 9, 1947, said Trial Examiner held a hearing in this proceeding at which a partial stipulation of facts was entered into upon the record and certain exhibits received in evidence pursuant to said stipulation. Subsequent thereto on March 9, 1948, Earl J. Kolb, the undersigned, was duly designated and appointed by the Commission as Trial Examiner in this proceeding to take testimony and receive evidence herein and to perform all other duties authorized by law, in the place and stead of Trial Examiner Frank Hier.

At the initial hearing held before Trial Examiner Earl J. Kolb at Chicago, Illinois, on April 12, 1948, the parties by stipulation waived any objections which they might have to the substitution of Earl J. Kolb as Trial Examiner in the place of Frank Hier in this

proceeding and the parties further stipulated that the stipulation heretofore entered upon the record and the exhibits admitted in evidence pursuant thereto be considered as though said stipulation had been entered into before and the exhibits received by, the undersigned as presiding Trial Examiner.

Thereafter hearings were held before the undersigned as Trial Examiner at which testimony and other evidence were introduced in support of, and in opposition to, the allegations of said com-

plaint.

Transcript of testimony and exhibits were duly filed in the office of the Commission at Washington, D. C., and the Trial

Examiner issued his order dated January 17, 1949, closing reception of testimony. Subsequent thereto Suggested Findings and Conclusions were filed by counsel in support of the complaint, and by counsel for the respondent on March 15, 1949, and March 14, 1949 respectively. This case was closed before the Trial Examiner on April 26, 1949 and the Trial Examiner now submits his recommended decision herein.

II. Pleadings

The complaint

The complaint charges that the respondent, Motion Picture Advertising Service Company, Inc., a corporation; in connection with the sale, lease, rental and distribution in interstate commerce of commercial or advertising films has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films on the screens of the theatres owned or controlled by such exhibitors.

The complaint further charges that the acts and practices of the respondent in entering into, adhering to and enforcing screening agreements with exhibitors for the exclusive privilege of exhibiting commercial and advertising films, produced and distributed by it, on the screens of the theatres owned or controlled by such exhibitors, have the capacity, tendency and effect of unduly restraining and restricting competition in the interstate sale, lease, rental and distribution of commercial advertising films and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

The complaint further charges that as further effect of the above described agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through other film distributors have been compelled as a result of the restrictive provisions of said agreements either to place their business with the respondent or to forego this type of advertising.

The answer

Respondents in their answer admit the use of the exclusive screening agreements as alleged in the complaint but deny that the use of such exclusive screening agreements has the capacity, tendency or effect of restraining trade or monopolizing business within the intent and meaning of the Federal Trade Commission Act.

In addition the answer alleges as affirmative defenses that the Federal Trade Commission does not have jurisdiction of these proceedings because the issues involved were finally adjudicated by the Federal Trade Commission in its former proceedings against respondent in Docket No. 4736 entitled "In the Matter of Screen Broadcast Corporation, a corporation, et al."

The issues

1. Do respondent's screening agreements, by which exhibitors agree not to screen or display any advertising films other than those furnished by the respondent, restrain competition to the extent that public interest requires corrective action under Section 5 of the Federal Trade Commission Act?

2. Were the issues involved in this proceeding finally adjudicated by the Commission in its former proceeding against respondent in Docket No. 4736?

. III. Report Upon the Evidence

Issue 1. Do respondent's screening agreements, by which exhibitors agree not to screen or display any advertising films other than those furnished by the respondent, restrain competition to the extent that public interest requires corrective action under Section 5 of the Federal Trade Commission Act?

1. The respondent Motion Picture Advertising Service Company, Inc., is a corporation organized under the laws of the State of Louisiana with its principal office and place of business located at 1032 Carondelet Street, New Orleans, Louisiana.

2. Since 1925 respondent has been engaged in the production and distribution of motion picture advertising films which it produces and causes to be exhibited upon the screens of motion picture theatres throughout the various states of the United States. In connection with the distribution of such motion picture film advertising, the respondent enters into contracts for the display of such advertising with advertisers and also enters into theatre

FTC VS. MOTION PICTURE ADVERTISING SERVICE CO., INC.

screening agreements with theatre owners, both independent and chain, who are hereinafter referred to as exhibitors.

3. In the performance of its contracts with various advertisers to display advertising films in various theatres, the respondent ships such advertising films from its place of business in the State of Louisiana to various exhibitors located in other states of the United States, which advertising films are reshipped to the respondent after screening has been completed by the exhibitor. In the case of the manufacturer-dealer or cooperative film advertising the respondent also ships its advertising films to other distributors for screening in theatres controlled by such distributors in the various states of the United States.

4. In the course and conduct of its business, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns in the sale, lease and distribution of commercial or advertising films in interstate commerce. There are in the United States at least 28 producers and distributors of 35 mm, film advertising playlets.

5. The advertising film busines as conducted by the respondent falls into three divisions: local advertising, manufacturer dealer or cooperative advertising, and national advertising (Tr. 439-60).

6. These motion picture advertising films used by the respondent are of the playlet type, about 40 feet in length, with a 20 foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment (Tr. 403, 514).

7. In local advertising the expense of producing a special film for the advertiser would be prohibitive. In order to make such advertising available to local advertisers the so-

make such advertiser would be prohibitive. In order to make such advertising available to local advertisers the so-called library film has been developed by the respondent and other advertising film producers and distributors. These library films consist of a series of playlets, advertising various lines of business (Tr. 400-03). Respondent carries playlets in its library sufficient to advertise about forty lines of business with a different playlet each week (Tr. 577). These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets (Tr. 399, 435-36).

8. The manufacturer-dealer or cooperative program uses playlets much the same as the library films for local advertising except that under this plan a series of specific playlets are produced advertising the produce of the manufacturer. Under this plan the manufacturer usually pays the cost of the production and the prints and the dealer pays all or part of the theatre charge. In

such cases the playlet carries trader identifying the dealer much the same as in local advertising (Tr. 408-11, 448-54).

9. National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the cost of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising, where the manufacturer sells to a large number of dealers on a nonexclusive basis (Tr. 411-13, 456-59).

10. The screening agreements, used by the respondent, provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of the theatres designated, at each and every performance and at a time when the theatre is dark and the audience is scated and that the respondent will pay the exhibitor each month for screening as designated in the contract, and the exhibitor agrees to return all films promptly to the respondent at the end of the screening period (Com. Exs. 21, 22).

11. In the course and conduct of its business, and particularly with reference to its local advertising, the respondent usually requires its salesmen to visit deisgnated towns in their territory at regular and frequent intervals. The salesman first contacts the theatre and determines what screening space is available for film advertising and endeavors to get an agreement in writing from the theatre for the display of respondent's advertising films on the screens of such theatre. When such agreement has been executed, the salesman then proceeds to sell the allotted space on the theatre screen to advertisers (Tr. 439-43).

12. The respondent enters into written contracts with exhibitors for the maximum period of five years with many being written for two year and one year terms. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees to display only advertising films furnished by the respondent excepting films or slides for charitable or governmental organizations or slides for charitable or governmental organizations.

mental organizations or announcements of attractions of the theatres. An average of about one-third of the theatre screening agreements expires each year (Tr. 335, 572-73; Com. Exs. 21, 22).

13. Contracts for screening with the theatres provide that upon expiration or termination of the agreement all service that has been contracted for during the life of the agreement is to be screened until such service contracts are terminated by performance (Com. Exs. 21, 22).

14. In the case of local advertising several weeks or months may elapse after the screen has become available before sufficient contracts with advertisers can be obtained to fill the screen of the

theatre. In the case of manufacturer-dealer or cooperative advertising, a lapse of several months may occur between the initial solicitation of the advertiser and the production of the playlets, approval by the advertiser and solicitation of dealers (Tr. 828-31, 854-57, 1033, 1115-18).

15. Film advertising contracts with the advertiser should run

for at least a year to produce the desired results (Tr. 406-07). A year's advertising contract has thus become standard practice.

(Tr. 406-07).

16. As of August 1, 1547, there were approximately 20,306 theatres in the United States, and of these about 42,676 exhibited film advertising. Respondent as of that date had screening agreements with 4,096 theatres, of which 2,493 contained the exclusive clause (Com. Ex. 1). Approximately 25 percent of respondent's screening agreements are for a period of five years (Tr. 1122).

17. The number of theatres which display screen advertisements is limited, it having been estimated that only about 60 percent of the theatres accept film advertising (Com. Ex. 1). Theatre patrons resent the showing of too much film advertising and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes or 2 percent to 4 percent of the time consumed by each show (Tr. 570, 648, 652-53, 658-59, 671, 727-31, 789, 843, 952, 1014, 1068, 1089).

18. Several competitors of the respondent who appeared as witnesses testified that the exclusive contracts field by the respondent had prevented their firms from doing busines with certain

theatres and in certain localities:

a. T. B. Grinspan of the Parrot Distributing Company testified that this company had been engaged in the distribution of advertising films, theatre trailers and industrial films for the past 8 or 29 years. This organization does not make screening agreements with theatres but sells its films outright to advertisers or distributors, who make their own screening agreements with theatres. At one time the company carried a line of library films, but it has discontinued such films because of insufficient outlets for distribution (Tr. 76-88).

b. J. A. Pope testified that he was a distributor of advertising films, purchased from the Parrot Film Company during the period from 1940 to 1945, in the territory of Arkansas, Oklahoma and Southern Missouri, and that a number of theatres

82 discontinued or refused to screen advertising for his customers because of exclusive agreements with the respondent

(Tr. 97-228). Witness testified that he quit the film busines' because he could not book enough theatres to keep him going (Tr. 128). This witness also stated that in 1943 Parrot informed him

that film was getting scarce and that they might have to discontinue and that they could not supply all the advertising film that he wanted and cut down the number of ads they could supply

(Tr. 225-26).

c. W. Bill Reichert testified to being unable to continue or to place film advertising on the screens of certain theatre chains and individual theatres because of exclusive agreements between the exhibitors and the respondent. Witness further testified that the respondent did upon request permit his films to be screened in some of the theatres where respondent had screening agreements, on the regular commission arrangement of 15 percent less 2 percent for eash (Tr. 231-65, Res. Ex. 1).

& Rene P. Karrigan and Robert Weigan, officers of Commerce. Pictures Sales, Inc., testified as to discontinuance of advertising and inability to place advertising in certain theatres because of exclusive contract between the exhibitors and the respondent. Witness testified that he had arrangements to screen advertising in some theatres controlled by the respondent on regular agency commission basis of 15 percent and that he had not been able to screen advertising in such theatres until after making the agency arrangement with respondent (Tr. 295-334).

e. Noble C. Campbell testified that he was a distributor of Parrot Films in Kentucky, West Virginia, Virginia, North Carolina, and South Carolina and that he had been unable to do business with certain exhibitors because of exclusive con-

tracts with respondent (Tr. 340-60; Com. Ex. 27D).

19. In presenting their case the respondent offered testimony and other evidence to show that the advertising films sold or distributed by certain of its competitors were inferior and less acceptable to theatres than the advertising films of the respondent and for this and other reasons these competitors had been excluded from the screens of certain theatres and not because of the existence of exclusive agreements:

a. John S. Dougherty testified that he used Parrot Films but they were old and out of date, due principally to war conditions, and were 20 feet in length rather than the usual 60 feet. vertisers complained that these films were not satisfactory for their business and theatres considered the films unsatisfactory

(Tr. 680-700).

b. Arthur E. Fox while with Dougherty about 1943 or 1944 used Pairot Films which were old and out of date in addition to being short. Caused a lot of complaints and loss of customers. (Tr. 761-16).

c. W. R. Arndt handled S. & M. ads but arrangement was unsatisfactory as he received films for only one week (Tr.

753-73).

d. J. I. Christian worked with William A. Reichert, Theatre Publicity Service, for two years and with Ross for bout nine months. Both used reader type of film with wording uperimposed. Advertisers preferred playlet type. Went into usiness for himself and used same type of film which he had used when with Reichert (Tr. 968-89).

e. Emest H. Forsythe, theatre owner, Houston, Texas, had conract with William A. Reichert, Theatre Publicity Service, which he canceled for failure to make payments in spring of 1948 (Tr. 043-49). This was after Reichert had gone out of business Tr. 234).

20. Respondent makes screen space available to competitors if alms are of standard length and of the quality distributed by espondent, if acceptable to the theatre, and if space is available, at rade rates less a discount. In such cases competitor would pay ame rate respondent charges its advertising customers less compession of 15 percent, out of which the competitor would have to

ay for the film (Tr. 562, 605). . .

21. In some instances when unable to sell sufficient space on the heatre screen the respondent permitted the theatre to accept adertising from its competitors. Such theatres were usually those a small towns where respondent was not able to give the theatre afficient revenue to require it to live up to the exclusive clause of the agreement. When respondent has sold space about up to the capacity of the screen or the exhibitor is satisfied with the exclusive arrangement respondent requires advertising

of competitors to be submitted to it (Tr. 499-502).

22. There is competition among film advertising distributors for he securing of theatre screening agreements and theatres frewently change distributors at the termination of contracts (Tr. 74, 482-86, 537-38, 578-79).

23. It was the contention of the respondent that because of the eneficial value of exclusive screening agreements to both the istributor and the exhibitor or theatre owner that there is no ublic interest involved in this proceeding. In support of this entention the respondent offered the testimony of various discributors, including both competitors and members of its own ales organization, who testified as to the benefits to distributors from the use of exclusive screening agreements as follows:

(a) That the maintenance of a satisfactory and up-to-date film brary requires a nucleus of exclusive screening agreements with neatres in order to sell the library film service to local advertisers Tr. 427, 481-82, 515-16, 549-50, 606-07, 685, 779-80, 799-80, 933-34).

(b) That exclusively screening agreements are beneficial to the istributor, in enabling him to sell manufacturer-dealer or co-

operative programs (Tr. 515-16, 549-50, 606-07, 799-80, 803-05, 837-42, 1100-03).

(c) That exclusive screening agreements are also beneficial to the distributor in enabling him to maintain a satisfactory

sales force as salesmen will not work a territory unless assured by exclusive screening agreements that theatre spacewill be available (Tr. 549).

(d) That the respondent cannot deal with the theatre on a partial or minimum guarantee basis unless protected by an ex-

clusive screening agreement (Tr. 445-46, 475).

24. In addition respondent offered the testimony of various distributors and exhibitors who testified as to the benefits to the exhibitor or theatre of exclusive screening agreements and the reasons why they prefer such exclusive screening agreements as follows: ..

(a) That such contracts afford better control of theatre screens (Tr. 645-46, 650, 660-68, 721-22, 746, 765-66, 792-93, 844-45, 892-93, 960-61).

(b) That exclusive screening agreements prevent misunderstandings with local advertisers (Tr. 650, 668-69, 670-72, 721-22, 746-47, 844-45).

(c) That exclusive screening agreements permit theatre to realize the maximum income from screen rentals (Tr. 650, 670-72, 721-22, 725-26, 746, 959).

(d) That exclusive screening agreements by confining dealings to one distributor eliminate complicated bookkeeping procedure (Tr. 844, 848, 892-93, 1069).

(e) That exclusive screening agreements limit film, ad patronage to reliable distributors who will give efficient service and promptly pay bills (Tr. 738-39, 746-47, 765-66, 1014, 1031, 1088-89).

(f) That exclusive screening agreements enable the exhibitor or theatre to control the quality of advertising film on their screens (Tr. 721-22, 765-66, 893, 915-16, 1014, 1088-89).

(g) That exclusive screening agreements enable the exhibitor or theatre to insist upon minimum guarantee (Tr. 576, 600, 721-22, (089)...

Issue 2. Res judicata

1. The defense of res judicata raised by the respondent, based upon a previous proceeding before the Federal Trade Commission in Docket No. 4736, entitled Screen Broadcast Corporation, et al., is not applicable to this proceeding because the issues in . volved are not the same. Furthermore, this defense was raised in this proceeding by a motion to dismiss, which was denied by

the Commission by its order of February 20, 1948, and is an adjudication of this issue which is binding upon the Trial Examiner.

IV. Conclusions

The shipment of commercial or advertising films from the respondent's place of business in the State of Louisiana to exhibitors, the eres and distributors located in other states of the United States, for screening and to be reshipped to the respondent, constitutes a constant flow of such commercial or advertising films in interstate commerce such as to give the Commission jurisdiction

in this proceeding.

The use of an exclusive screening agreement is of material assistance in permitting the respondent to hold for its own use the screens of the theatres with whom such contracts were made. By such agreements the respondent is enabled to control the entire screening space for advertising in a theatre by the purchase or guarantee as to only a portion of the available screening space. While witnesses have testified that exclusive screening agreements are necessary to the maintenance of a film library and an efficient sales organization, this is not controlling.

The use of exclusive screening agreements are of material assistance to the theatre in controlling the advertising to be placed on the screen, in eliminating bookkeeping expense and in giving the theatre a bargaining element to obtain more money or higher

guarantees for their screening space.

Public interest in this proceeding involves the maintenance of free and open competition. The fact that the agreements in question may be beneficial or instrumental to the respondent in building up its business, or that they may be preferred by theatres, is not material where the effect of such agreements is to restrain and restrict competition.

The restraint upon competition caused by the use of the excluive clause in screening contracts with theatres is not removed by . making space available to competitors in theatres where respondent has exclusive contracts. The conditions under which said space is made available are that films must be of standard length,

of the quality distributed by the respondent, satisfactory to the theatre, and space must be available. The terms under which advertising of a competitor will be screened require the payment to respondent of the same rate respondent charges its advertising customers less 15 percent commission. Out of this co:amission the competitor must pay the costs of the film, overhead and sales expense which would so limit his profit as to make such arrangement unprofitable in local advertising.

The Trial Examiner has given consideration to the effects of exclusive screening agreements upon competition and the extent to which they should be restricted or prohibited, and is of the opinion that under the charges of the complaint it is necessary to consider the exclusive agreement in connection with the contracts with advertisers to determine its effect.

The complaint in this proceeding does not attack the exclusive clause as such but only when used in a long term screening agreement. The charges of the complaint as set out in Paragraph Four

thereof read in part as follows?

"In or about the year 1937, and from time to time thereafter." said respondent has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theatres owned or controlled by said exhibitors, and said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films.

While the use of long term screening agreements was denied in the answer of the respondent, no evidence was introduced in

support of the complaint as to what might constitute a long 90 term agreement and consideration must be limited to the evidence introduced by the respondent in justification of the length of their contracts with exhibitors.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become standard practice. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year

except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theatre to determine the space available for screen: advertising and enters into a contract for such space. way he can then approach the advertiser in a position to show him where space for film advertising is available. In contracting with the theatre it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since the film advertising space in theatres is limited to four, five or six ads it is not unreasonable for the respondent to contract for all the space available. This is particularly true in the regular territory when the salesman works the locality at regular and frequent intervals.

It accordingly must be concluded that an exclusive screening agreement for a period of one year is not an undue restraint upon The purpose of the Federal Trade Commission Act is not to equalize opportunity but only to maintain free and open compeition.1 In reaching this conclusion the Trial Examiner

¹ Federal Trade Commission vs. Paramount Famous-Lasky Corp., 57 F. (2d) 152, 157.

rejects the contention of the respondent that due to delays in starting advertising contracts after screening agreements 91 are executed, a contract for three years or longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by usual custom and by the terms of respondent's contract the theater completes the screening of advertisements as required by contract between distributor and advertiser even though the expiration date of such contract extends beyond the expiration of the screening agreement between distributor and theatre.

It is further concluded that public interest requires that the use of exclusive screening agreements which extend for terms greater than one year, be prohibited as constituting an unreasonable restraint and restriction of competition in violation of the

Federal Trade Commission Act.

V. Proposed Findings

A. Proposed Findings submitted by attorney in support of the

complaint.

1. The Trial Examiner has adopted in substance the findings proposed in Paragraphs 2 to 15 of the proposed findings and conclusion filed by the attorney in support of the complaint.

2. The Trial Examiner has disregarded Paragraph 1 of the

said proposed findings as not material to the issues.

3. The Trial Examiner has rejected the proposed conclusion of the attorney in support of the complaint for the reasons set out in Section IV hereof entitled Conclusions.

· B. Proposed Findings submitted by the attorney for the

respondent.

1. The Trial Examiner has adopted in substance the findings proposed in Paragraphs 1-5, 7-14, 16-32, 34-35, 37, 39 of the proposed findings and conclusions filed by the attorney for the respondent.

2. The Trial Examiner has disregarded Paragraphs 6, 15, 33, 36, 38, 40 of said proposed findings as not material to the issues.

3. The Trial Examiner has rejected proposed conclusions 1 to 12 filed by the attorney for the respondent for the reasons set out in Section IV hereof entitled Conclusions.

VI: Recommended Findings as to the Facts

Paragraph One. Respondent Motion Picture Advertising Service Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana with its principal office and

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place of business located at 1032 Carondelet Street, New Orleans in the State of Louisiana.

Paragraph Tv o. Since 1925 the respondent has been engaged in the business of preducing, selling, leasing and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theatres, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theatre owners both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theatres and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theatres, respondent ships such advertising films from its place of business in the State of Louisiana to the various theatres and exhibitors located in other states of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Louisiana, either directly to such distributor or to the theatres designated by them, located in states other than the State of Louisiana. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Louisiana by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Three. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, lease, and distribution of commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Four. The motion picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20 foot frailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon anima-

tion with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer.

The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theatre charge. This plan is much the same as the use of

library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising when the manufacturer sells to a large number of dealers

on a nonexclusive basis.

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Paragraph Five. In the conduct of its business the respondent enters into written screening agreements with exhibitors and theatres for the maximum period of five years with the majority being written for two year and one year terms. It was estimated that about 25 percent of respondent's screening agreements were for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of their theatres as designated, and return such films to the respondent at the end of the screening period and that the respondent will pay the exhibitor each month for screening as designated in the contract.

Paragraph Six. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers, usually for a period of one year, for

the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theatres weekly or every other week for a period of usually one year. The shortest term contract which the respondent will accept from an advertiser is thirteen weeks, but this is very rare, and contracts for one year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

Paragraph Seven. The usual practice; particularly in local advertising, is to make an arrangement with the theatre first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theatre. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theatre expires.

It is the customary procedure in such cases for the theatre to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theatre and distributor means a period of time in which the

distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

Paragraph Eight. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will screen or display only advertising films furnished by the respondent, excepting films or slides for charitable or governmental organizations or announcements of attractions of the theatres.

Paragraph Nine. As of August 1, 1947, there were approximately 20,306 theores in the United States and of these about 12,676 exhibited film advertising. The respondent as of that date had screening agreements with 4,096 theatres of which 2,493 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent.

Paragraph Ten. The available space for screening advertisements is limited and only approximately 60 percent of the theatres accept film advertising. In addition theatre patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theatres, the number varying from three to six advertisements or an overall of two to four minutes or two to four percent of the time consumed by each show.

Paragraph Eleven. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own 98 use the screens of the theatres with whom such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theatres thereby limiting the outlets for their films in a more or less limited field and in some instances resulting in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

Paragraph Twelve. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) that respondent does in fact make screen space available to competitors, in theatres with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theatre and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theatre, public

interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense which so limits his profit as to make such

arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theatres and advertisers. Theatres in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of ... exclusive use of the screen during the term of his contract.

Conclusion

The Commission has been given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but

denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

Public interest in this proceeding involves the maintenance of free and open competition. The fact that the agreements, in question, may be beneficial or instrumental to the respondent in building up its business, or that they may be preferred by theatres, is not material where the effect of such agreements is to restrict

and restrain competition.

In considering the effect upon competition of the use of respondent's screening agreements in the light of the charges of the complaint, the Commission is of the opinion that the legality of the agreements of the respondent, so far as restraint of competition is concerned, is dependent upon the relationship between the term of respondent's screening agreements with theatres and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended

beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theatre to determine space available for screen advertising and then enters into a contract for such space. In this way he can then approach the advertiser and is in a position to show him where space for film advertising is available. In contacting the theatre it is necessary for the respondent to estimate the amount of space it will be able to sell the advertisers. Since film advertising space in theatres is limited to 4, 5, or 6 ads, it is not unreasonable for respondent to contract for all space available. This is particularly true in its regular territory when the salesman works the locality at regular and frequent intervals.

It is therefore the conclusion of the Commission that an 101 exclusive screening agreement for a period of one year is not an undue restraint upon competition. In reaching this conclusion the Commission rejects the contention of the respondent that, due to delays in starting advertising contracts after screening greements were executed, a contract for three years or for a period longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theatre completes the screening of advertisements

as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the re-

spondent and theatre.

It is further concluded that public interest requires that the use of exclusive screening agreements which extend for terms greater than one year, should be prohibited as constituting an unreasonable restraint and restriction of competition in violation of Section 5 of the Federal Trade Commission Act.

VII. Recommended Order to Cease and Desist

It Is Ordered that the respondent Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees, directly of through any corporate or other device in connection with the offering for sale, sale, lease or distribution of commercial or advertising films in commerce as "commerce" is defined in the Federal Trade Commission

Act, do forthwith cease and desist from

.1. Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year.

It Is Furthered Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner

and form in which it has complied with this order.

Respectfully submitted.

Earl J. Kolb. (EARL J. KOLB),

Trial Examiner.

May 31, 1949.

Note re request and order

Request of counsel supporting the Complaint for Extension of Time to File Exceptions to Trial Examiner's Report and Order approving same thereon;

Order by the Commission Extending time for filing Exceptions

to Trial Examiner's Report:

Omitted from the Printed Record, Pursuant to Petitioner's Designation as to Printing Record, copied at Page 1.

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Before Federal Trade Commission

Stipulation

Received January 16, 1949

[Title omitted.]

Counsel for respondent and counsel in support of the complaint hereby stipulate and agree to waive, and by the terms of this stipulation respectively do waive, the filing of exceptions to the Trial Examiner's report upon the evidence, conclusions, recommended findings as to the facts and conclusions, and recommended order, filed herein May 31, 1949, and other intervening procedure including the filing of briefs and the presentation of oral argument before the Commission.

Dated at Washington, D. C., this 15th day of June 1949.

Louis L. Rosen, (Louis L. Rosen),

Counsel for Respondent Motion Picture Advertising Service Company, Inc.

> Floyd O. Collins, (FLOYD O. COLLINS,) Counsel Supporting the Complaint.

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Before Federal Trade Commission

Findings as to the facts and conclusion

October 17, 1950

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson.

[Title omitted.]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said Act. After the respondent filed its answer; testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and

other evidence, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts

Paragraph One. Respondent Motion Picture Advertising Service Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business located at 1032 Carondelet Street, New Orleans, in the State of Louisiana.

Paragraph Two. Since 1925 the respondent has been engaged in the business of producing, selling, leasing and distributing commercial or advertising films to or for advertisers and to other

distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theaters and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theaters, respondent ships such advertising films from its place of business in the State of Louisiana to the various theaters and exhibitors lo-

cated in other states of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Louisiana, either directly to such distributor or to the theaters designated by them, located in states other than the State of Louisiana. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Louisiana by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Three. In the course and conduct of its business as berein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, leasing and distribution of commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Four. The motion picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertis-

ing, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon

animation with sound accompaniment. .

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theatre charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturers has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and

the costs of production and exhibition are born exclusively
by the manufacturer. This plan is generally used for product advertising when the manufacturer sells to a large
number of dealers on a nonexclusive basis.

Paragraph Five. In the conduct of its business the respondent enters into written screening agreements with exhibitors and theaters for a maximum period of five years with the majority being a ritten for two years and one year toward.

being written for two year and one year terms. It was estimated that about 25 percent of respondent's screening agreements were

for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of their theaters as designated, return such films to the respondent at the end of the screening period, and that the respondent will pay the exhibitor each month.

for screening as designated in the contract.

Paragraph Six. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with adverticers usually for a period of one year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually one year. The shortest term contract which the respondent will accept from an advertiser is thirteen weeks, but this is very rare, and contracts for one year have become the standard practice. The films are changed so that there is

a different playlet for each week that a film is shown. Paragraph Seven. The usual practice, particularly in

local advertising, is to make an arrangement with the theater first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

Paragraph Eight. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will screen or display only advertising films furnished by the respondent, excepting films or slides for charitable or governmental organizations or announcements of attractions

of the theaters.

Paragraph Nine. As of August 1, 1947, there were approximately 20,306 theaters in the United States and of these about 12,676 exhibited film advertising. In the District of Columbia and the 27 states where theaters having contracts with

respondent were located, there were approximately 6,260 theaters regularly exhibiting screen advertising for compensation. The respondent as of this period had screening agreements with 4,096 theaters of which 2,493 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by respondent.

Among others engaged in the sale and distribution of advertising films are Reid H. Ray Film Industries, Inc., Alexander Film Company, and United Film Service, Inc., which companies are respondents in Dockets 5495, 5496, and 5497, respectively. As of August 1947 Reid H. Ray Film Industries, Inc., had agreements with exhibitors operating 1.450 theaters and of this number the agreements relating to 458 contained the provision that no local advertising other than commercial film advertising furnished by Reid H. Ray Film Industries, Inc., would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of two years. Alexander Film Company had screening agreements containing an exclusive feature on its behalf, some for a maximum term of three years, with 4,913 theaters, and United Film Service, Inc., had similar contracts with 1,562, many for a maximum term of five years. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated

three-fourths of the total number of theaters in the United States which displayed advertising films for

. compensation.

Paragraph Ten. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an over-all of two to four minutes or two to four percent of the time consumed by each show.

Paragraph Eleven. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leas-

ing, rental and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been ma-

terially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by Reid H. Ray Film Industries, Inc., Alexander Film

Company, and United Film Service, Inc.

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Paragraph Twelve. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) that respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means

of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

Conclusion.

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distrib-

utor, exhibitor, and advertiser there is no unlawful restraint of, competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen, and injure competition.

· In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive

provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness. of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended

beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's. representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell/to advertisers. Since film advertising space in theaters is limited to four, five or six advertisements, it is not unreasonable for respondent to contract for all space available such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period . of one year is not an undue restraint upon competition.

115 The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed a contract for two years or for a period longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of ad-

vertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of exclusive screening agreements which extend for terms greater than one year constitutes an unreasonable restraint and restriction of competition and that prohibition of respondent's

use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

By the Commission, Commissioner Mason dissenting.

SEAL]

Jas. M. Mead. (JAS. M. MEAD). Chairman.

Issued October 17, 1950.

Attest:

W. P. Glendening, Jr., (WM. P. GLENDENING, Jr.). Acting Secretary.

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Before Federal Trade Commission.

Order to cease and desist

October 17, 1950

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson.

[Title omitted.]

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the espondent testimony and other evidence taken before a trial xaminer of the Commission theretofore duly designated by it, nd the recommended decision of the trial examiner (all other ntervening procedure, including the filing of briefs and presentaon before the Commission of oral argument having been aived); and the Commission, having made its findings as to the acts and its conclusion that the respondent has violated the rovisions of the Federal Trade Commission/Act:

It Is Ordered that the respondent, Motion Picture Advertising ervice Company, Inc., a-corporation, and its officers, representtives, agents and employees, directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission

Act, do forthwith cease and desist from-

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It Is Further Ordered that the respondent shall, within (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission, Commissioner Mason dissenting.

Wm. P. Glendening, Jr., (Wm. P. Glendening, Jr.),
Acting Secretary.

Issued October 17, 1950.

"Opinion of the Commission" is attached.

"Dissenting Opinion of Commissioner Lowell B. Mason" is attached.

11.8

Before Federal Trade Commission

Opinion of the Commission

Docket No. 5495, Docket No. 5496, Docket No. 5497, Docket No. 5498

IN THE MATTER OF RAY-BELL FILMS, INC., ALEXANDER FILM COM-PANY, UNFTED FILM AD SERVICE, INC., MOTION PICTURE ADVER-TISING SERVICE COMPANY, INC.

MEAD, Commissioner:

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were exgaged in unfair practices in violation of Section 5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theatres located

throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from one year or less up to five years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom

the contract is made. Respondents films may be prepared pursuant to agreements with merchants who are prospective

advertisers, but there is a substantial volume of ready made or so-called library film of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of one year or less. .

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restraint upon commerce and are therefore in violation of Section 5 of the Federal Trade Commission Act. It appears that the use by the respondents of their exclusive creening agreements has been of material assistance in permitting each of the respondents to hold for his own use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theatres thereby limiting the outlets for competitive films in a more or less fimited field. In some instances, competitors have been forced to go out of the screen advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents.

Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead and sales expense so limits the profit of such competitor as to make this

arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening/arrangements constitute an unreasonable restraint and restriction of competition. has further concluded that such exclusive screening arrangements as extend for one year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given

weight to the fact that contracts with advertisers normally run for a period of one year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contracts with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for

such film advertising as they may like to purchase.

The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of one year are supported by the greater weight of the evidence. The Commission moreover is of the view that in the circumstances here, such exclusive agreements as are limited to one wear or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the Court in United States v. American Can Company, 87 Fed. Supp. 18 (November 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to five years. Although the Court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monopoly promoted, in applying the remedy therefor it was further concluded that agreements extending for one year should be absolved of adverse competitive effects in the circumstances of that case. The Court

in such connection stated:

122 "Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of one year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present

the five year requirements contracts, would be removed. Under contract limited to one year, the user-consumer would be guarteed an assured supply and protected by a definite obligation the part of American to meet the totality of needs of the canr, while he, in turn, would have a fixed obligation to purchase s seasonal needs from American, thus making for mutuality of ntract and obligation.

"To strike down the requirements contracts and to declare them tally void as violative of the Sherman Act, without at the same ne affording to the user-consumer a supply over a limited period time, would be destructive, illogical, unsound and not in connance with the acute and particular problem's confronting the

nning industry."

It is noted, however, that at the time this opinion is being writthe judgment of the trial Court in that case has not yet become al since hearings pertaining to the type of relief to be granted

e in progress.

As of August 1947, the total number of exclusive agreements ld by respondents in the aggregate approximated three-fourths the total number of theaters in the United States which reen film advertising for compensation. Although the Commission has determined in these cases that the effects of the exclusive contracts for a period in excess of one year have 3 been to unduly restrain competition, the action of the Comssion in these cases manifestly does not impinge on the rights respondents to contract for extended terms on a nonexclusive

sis with theater owners under circumstances which do not unly hinder competition. The corrective action of the Commison is directed only to such exclusive agreements as are designed exclude unreasonably for prolonged periods the advertising ms of competitors of respondents from the screens of theaters. is the view of the majority of the Commission that the orders cease and desist which are issuing herewith are appropriate the circumstances here.

Before Federal Trade Commission

ote re dissenting opinion of Commissioner Lowell B. Mason

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC. 1

Commissioner Mason dissents to the order herein for the reasons has set forth in Docket No. 5495, Ray-Bell Films, Inc.

> Lowell B. Mason, (LOWELL B. MASON), Commissioner.

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

I, D. C. Daniel, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby
certify that attached is a full, true, and complete copy of:
dissenting opinion by Commissioner Lowell B. Mason in Docket
5495, in the matter of Reid H. Ray Film Industries, Inc., referred
to in dissenting opinion by Commissioner Mason in Docket 5498,
in the matter of Motion Picture Advertising Service Company,
Inc., which lattergrecord was certified to the United States Court
of Appeals for the Fifth Circuit, April 5, 1951; that this document is certified to the United States Court of Appeals for the
Fifth Circuit pursuant to the request of counsel for petitioner.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed

this 8th day of June A. D. 1951 at Washington, D. C.

[SEAL]

D. C. DANIEL,

Beford Federal Trade Commission Secretary.

Dissenting pinion of Commissioner Lowell B. Mason

Docket No. 5495

IN THE MATTER OF RAY-BELL FILMS, INC.

To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theaters for the exhibition of respondent's trailer ads.

When you look at a picture extolling the virtues of a specific commercial product, you are looking at a trailer ad.

People mostly go to the movies to forget their cares. In the words of the industry, "This is the privilege of motion pictures, that they bring great joy and relaxation to humankind."

Trailer ads do not bring audiences much of either. Generally, people believe any form of advertising in a place of amusement

is a bore and ought to be done away with.

On the other hand, the small theater owner benefits from trailer

ads. He is paid to show them.

Features, news reels and shorts cost him money. However, trailer ads actually reverse the flow of film money back into his own till. He pays for a film of somebody's love life, but he gets paid for showing the cold facts about somebody's breakfast food or shaving mugs.

The order in this case prohibits the trailer ad maker from leasing screen time from a theater owner for a greater period than one year. If we could do this, it might be a great favor to audiences. Unforunately, the privilege of boring the public for pay is a theater owner's inalienable right, provided he doesn't carry the thing too far.

People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why audiences in small towns and communities sit quietly every night whilst the community theater parades a variety of commercial plugs across the screen.

I do not believe be should prohibit a theater owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theater owners) may want to sell, namely a lease for more than one year.

It must be borne in mind that the gravamen of the charge is not aimed at the exclusiveness of the contract for as the Findings

of Facts concede:

"Since film advertising space in theatres is limited to four, five or six advertisements, it is not unreasonable for respondent to contract for all space available for local advertising in such theatres, particularly in territories canvassed by its salesmen at regular and frequent intervals."

The prohibition runs to the length of the lease rather than its terms. The order says "yes" to one year but "no" to anything

longer.

As I pointed out at the beginning, trailer ads are a source of income to small theaters. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For

them, it may be that portion of income which represents the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left.

to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce.

Leaving for the moment the unsalutory but indirect effect of this order on small exhibitors let us consider the direct problem

of respondent in this case.

I believe we should approach this not as a legal abstraction but realistically.

When a man sells something he does not have on his shelf he is a speculator. When the respondent (as here) is prohibited from assuring himself screen space for more than one year the time lag between the act of purchasing that space for one year, and reselling it to advertisers for one year will always place him in the speculator's seat.

We are reassured the order won't hurt the respondent because,

in the words of the Trial Examiner:

"The theatre completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theatre."

I like to think of all businessmen as generous but an order against a respondent which relies on the implied generosity of others to go easy on the hapless defendant stretches governmental

optimism too far.

Perhaps the case is of scant moment. Certainly a decision one way or another will not greatly affect our economy, but I dissent rather than let the matter go by because it illustrates the inequality and error that creep in to the Procrustean fitting of the law enunciated in such ponderous cases as U. S. vs. American Can (relied upon by the majority) when seeking to regulate the many and infinitesimal problems as are illustrated by Ray-Bell's alleged monopolistic practices here.

On the one hand we have litigation against a can company doing a fifth of a billion dollars' worth of business a year (the biggest in the world), and controlling over 46 percent of the "competition"

(if such it be) in the sale of cans.

On the other hand we have a tiny enterprise whose share of the limited market for film trailer ads is represented by the figure of 458 leases out of a probable 12,676 and a possible 20,306 or less

than four per cent of the competition.2

To apply the reasoning of the Court in the American Can case here is like killing butterflies with a pile driver.

Nor can Eput much stock in the plea that this order is needed to nip monopoly in the bud. If we nipped every bud with four per cent of a market the fields of American industry would look like Egypt's after the locasts. Ray-Bell has a long way to grow before its competitors need fear it will grow into a monopoly.

"The total number of exclusive agreements held by respondents in the aggregate

approximated 75% of total number."

² The majority opinion written to apply to the four companies sued states:

To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify antimonopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all the others approximated 100% of the total industry.

When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

I am against it.

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Lowell B. Mason, (LOWELL B. MASON), Commissioner.

Before Federal Trade Commission

Motion to modify cease and desist order -

Received December 29, 1950

Title omitted.

Now comes Motion Picture Advertising Service Company, Inc., a Corporation, respondent in the above entitled proceeding, and moves the Commission to modify its Cease and Desist Order issued on October 17, 1950, and received by respondent in New Orleans, Louisiana on November 2, 1950, by deleting therefrom immediately following the word "year" in the fourth-line of the indented portion of said Order, the following words, to wit:

or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from

the date of the service of this order."

so that said Cease and Desist Order, when so modified, shall read as follows, to wit:

"It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, rep-131 resentatives, agents and employees, directly or through

any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the Federal Trade Commission

Act, do forthwith cease and desist from—.

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when . the term of such contracts extends for a period in excess of one year."

In support of the foregoing motion respondent states:

I. Respondent has outstanding exclusive theatre screening agreements with motion picture exhibitors, the unexpired terms of which extend more than one year beyond the effective date of the Cease and Desist Order issued by this Commission, and if respondent is required to cancel these contracts or refuse to perform thereunder from and after one year from the effective date of said. Cease and Desist Order an undue burden and unnecessary hardship will be placed upon respondent without any public interest being served, for the following reasons, to wit:

(a) In many instances respondent has, at the time of the signing of the contracts, paid to the motion picture exhibitors a lump sum representing the purchase price or fair rental value of screen space for the entire terms of the contracts. Therefore,

the cancellation of these contracts, or of that portion of the term thereof which extends beyond one year from the effective date of the Cease and Desist Order, would result

in a serious financial loss to respondent.

(b) In many instances the exclusive provisions contained in said contracts and the length of the terms thereof constitute contractual requirements made by the motion picture exhibitors and not by respondent as a condition to the entering into of said contracts. Therefore, the cancellation of such contracts, or that portion of the term thereof which extends beyond one year from the effective date of said Cease and Desist Order, would place respondent in the position of refusing to carry out its obligations with the motion picture exhibitors who were not made parties to this proceeding. The very existence of respondent's business depends upon maintaining the good will of the motion picture exhibitors; and the cancellation of theatre screening agreements will, in many instances, adversely affect this good will.

2. Respondent has been from time to time, and is now, inactive and substantial competition with all other film distributors in the sale and distribution of commercial or advertising films, and particularly in the securing of screening agreements with motion picture exhibitors. In addition, the uncontradicted evidence is that an average of one-third of the theatre screening agreements between respondent and motion picture exhibitors terminate each year. Therefore, respondent's theatre screening agreements, the terms of which extend beyond one year from the effective date of the Cease and Desist Order, do not and cannot constitute such an unreasonable restraint of trade as would require the cancellation

of such screening agreements.

3. That the recommended decision of the Trial Examiner filed herein on May 31, 1949, contains his recommendation that the respondent be required to cease and desist from:

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year."

4. That this respondent and its attorneys relied upon the assumption that if no exceptions were filed by either party to the Trial Examiner's report then the report would be adopted by the Commission and the recommended decision and order would be entered.

5. That relying upon said assumption, counsel for this respondent and counsel in support of the complaint entered into a stipulation on June 15, 1949, under the terms of which both parties waived the filing of exceptions to the Trial Examiner's report and other intervening procedure, including the filing of briefs and the presentation of all arguments before the Commission.

6. That this respondent was willing to enter into such stipulation because it could comply with the recommended Cease and Desist Order without great financial loss or burden, but it cannot comply with the additional provisions of the Cease and Desist

Order as entered by this Commission under date of October 17, 1950, without substantial financial loss, detriment and burden.

7. That the issuance of any retroactive order by the Commission was not raised in the pleadings or made an issue in the proceedings, and no evidence of the effect of such Order on this

respondent is contained in the record.

Wherefore, Motion Picture Advertising Service Company, Inc., respondent herein, respectfully prays that the Cease and Desist Order heretofore rendered herein by the Commission be reconsidered, and that after such reconsideration said Order be modified and amended as hereinabove set forth.

Respondent further prays that the Commission fix a time for oral argument of this motion after reasonable notice to respond-

ent's attorneys.

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ROSEN, KAMMER, WOLFF, HOPKINS & BURKE, LOUIS L. ROSEN.

Attorneys for Motion Picture Advertising Service. Company, Inc., a corporation, Respondent 74 FTC VS. MOTION PICTURE ADVERTISING SERVICE CO., INC.

1801 HABERNIA BANK BUILDING, NEW ORLEANS, LOUISIANA

Before Federal Trade Commission

Answer to motion to modify order to cease and desist

Received January 15, 1951

[Title omitted.]

135

STATEMENT OF CASE

A complaint was issued on May 26, 1947, in which the respondent was charged with a violation of Section 5 of the Federal Trade Commission Act. The specific charge was that the respondent was engaged in the practice of entering into and carrying out contracts with theater owners for the exclusive use of the entire time allotted such theater owners for screen advertising. Several hearings were held for the purpose of taking testimony.

On May 31, 1949, the Trial Examiner filed his recommended findings as to the facts and order. On June 15, 1949, counsel supporting the complaint and counsel for respondent entered into a stipulation in which both parties waived the filing of exceptions, briefs and oral argument. On October 15, 1950, the Commission issued an order to cease and desist and said order was served on

respondent on November 2, 1950.

The order issued by the Commission differs from the order recommended by the Trial Examiner in the respect pointed out in the brief in support of respondent's motion. The matter is now before the Commission on respondent's motion to modify the order.

ARGUMENT

Counsel supporting the motion to modify the order contends that to comply with that part of the order which reads "or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order" would work a great hardship on respondent and cause respondent to lose a considerable amount of money which it has paid to beater owners for the screening time called for in the contracts, and in addition, would also cause respondent to lose the good will of the theater owners. Counsel also contends that the good will of the theater owners. Counsel also contends that the good will of the Trial Examiner.) was not taken into consideration by the respondent at the time counsel entered into the stipulation in which counsel waived exceptions to the Trial Exam-

iner's recommended findings as to the facts and order, for counsel assumed that the Commission would issue the order in the language recommended by the Trial Examiner.

We would like to state here that at the conference where the stipulation was worked out, there were no promises made by coun-

sel supporting the complaint that such an order would be issued; but counsel supporting the complaint did state that

it was his opinion that the Commission would, in all probability, follow the Trial Examiner's recommendation. We presume that all parties acted on that assumption. Counsel, in his brief in support of the motion to modify the order, does not state that counsel supporting the complaint represented that the Commission was in any way bound by the Trial Examiner's recommended decision and we do not believe that counsel intended to convey such an idea in his brief. Counsel supporting the complaint was thoroughly convinced that all parties understood that the Commision had the right to issue any order it desired to enter provided such an order was supported by the record.

It appears appropriate to point out are that the Trial Examiner recommended and the Commission found that the contracts extered into by respondent, where the terms of such contracts extended for more than one year, were enfair methods of competitive within the intent and meaning of the Federal Trade Commission Act, and, therefore, illegal. Counsel does not contend that the Commission's finding on that point was wrong. So, in existence this matter, it is necessary to keep in mind the fact that the contracts affected by that part of the order challenged by respondent are illegal contracts and they were not made illegal by the Commission's order, but by statute. They were illegal even before the commission issued its complaint.

Counsel does not state in his brief the number of contracts, the terms of which extend for more than a year beyond the effective

date of the order; but counsel does state:

"The uncontradicted evidence is that an average of onethird of the theater screening agreements between respondent and motion picture exhibitors terminate each year. Therefore, respondent's theater screening agreements, the terms of which extend beyond one year from the effective date of the cease and desist order, do not and cannot constitute such an unreasonable restraint of trade as would require the cancellation of such screening agreements."

In answer to that contention, it can be said that the complaint was issued on May 26, 1947. At that time the respondent had notice that the Commission considered such contracts illegal. The order was issued October 17, 1950, and served on respondent

on November 2, 1950. So, for a period of approximately three and one-half years respondent had notice that the Commission considered the contracts illegal. By the terms of the order the contracts in force could remain in force for another twelve months after the date of the order. That would be one year more or a total of four and one-half years that the respondent had notice that the Commission considered such contracts illegal. If one-third of the contracts expire each year, as stated by counsel, then it stands to reason that all of the contracts should have expired or would expire before any complaint could be made about respondent's failure to cancel them. If counsel should contend that it was unfair to calculate the time from the date the complaint was served, he surely could not complain of calculating the time from the date he entered into the stipulation not to take exceptions to the Trial Examiner's recommended decision. The stipulation was entered into on June 15, 1949, and the Commission's order was issued on October 15, 1950, and served on

respondent on November 2, 1950, a period of approximately eighteen months and the respondent was given another

twelve months within which to cancel out the contracts.

It appears to us that it is a complete answer to all of the argument advanced by counsel to say that the contracts were illegal and that the respondent had no right to enter into such

contracts in the first instance.

It appears to us that the order is more favorable to respondent than the law requires. We are of the opinion that the contracts (exclusive), whether for one year, two years, or even for one month are "unfair methods" of competition and therefore illegal. Counsel, in his brief, does not contend that the contracts, the terms of which are for more than one year, are not illegal. His contention is that respondent should be permitted to perform or carry out the terms of an illegal contract if non-performance would be injurious or burdensome to respondent.

We respectfully submit that on the merits, the motion to modify

should be denied.

Respectfully submitted.

Floyd O. Collins, (Floyd O. Collins), Counsel Supporting the complaint.

JANUARY 15, 1951.

JOSEPH E. SHEEHY,

Director, Bureau of Antimonopoly.

EVERETTE MACINTYRE,

Assistant Director, Bureau of Antimonopoly.

Before Federal Trade Commission

Order denying respondent's motion to modify order to cease and desist

March 6, 1951

Commissioners: James M. Mead, Chairman, William A. Ayers, Lowell B. Mason, John Carson, Stephen J. Spingarn.

Title omitted.

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This matter is before the Commission for its consideration of the respondent's motion, filed December 29, 1950, seeking modification of the order to cease and desist issued in this proceeding on October 17, 1950, and requesting the Commission to fix a time for oral argument on this motion, and the answer to such motion, filed by counsel in support of the complaint.

The order to cease and desist, the modification of which is

sought, reads in part as follows:

"It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representa-

tives, agents and employees, directly or through any corporate or other device, in connection with the sale, leasing

or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the Federal Trade Commission

Act, do forthwith cease and desist from-

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order." [Italics supplied.]

Respondent moves the Commission to modify its order by

deleting therefrom that part which is above underlined.

Respondent in its motion states that it has exclusive theater screening agreements with motion picture exhibitors, the unexpired terms of which extend more than one year beyond the effective date of the order. It contends that if required to cancel these contracts or refuse to perform thereunder from and after one year from the effective date of said order it will suffer serious financial loss in that it has paid for screen space in advance for the entire term of a number of such contracts and will suffer loss

required the exclusive dealing provision as a condition for entering into the said contracts.

The Commission in its decision in this matter, issued on October 17, 1950, concluded that in the circumstances the use: by respondent of its exclusive screening agreements which extend for terms greater than one year constitutes an unreasonable restraint upon competition and is in violation of the Federal Trade Commission Act. Respondent by this motion does not question the illegality of the exclusive screening agreements which extend for a term of over one year, but restricts itself to requesting the Commission to permittit to complete the unexpired terms of contracts containing such exclusive screening provisions.

Respondent, by its motion requesting the Commission to modify its order so as to permit respondent to continue the use of such exclusive screening provisions in its existing contracts is attempt-

ing to continue to secure the benefits of its illegal acts.

Not only has the use by respondent of such exclusive screening provisions in its contracts been illegal from their inception, but respondent has been given ample notice of this fact by the Commission. The provision of the order objected to by the respondent applied only to exclusive screening provisions which under the terms of the contracts extend beyond November 2, 1951, one year after the date of service of the said order. This date is over four years and five months from the date, May 26, 1947, on which the Commission by the issuance of its complaint herein notified respondent it had reason to believe its use of an exclusive screening provision in its contracts was illegal and is over two years and five

months from the date, May 31, 1949, on which the trial examiner, after considering the matter, recommended that the Commission rule that the use of such exclusive screening

provisions is illegal.

As stated in the Commission's findings as to the facts in this matter, respondent has entered into such exclusive agreements with exhibitors for a maximum period of five years, with the majority being written for one or two year terms. Therefore, while a few of respondent's contracts affected by the order may have been entered into prior to the issuance of the complaint, the majority of such contracts were entered into not only after the issuance of the complaint, but were entered into after the trial examiner recommended that the use of these agreements be found. to be illegal.

The Commission is of the opinion that this respondent should not be permitted to continue to secure the benefit of its illegal use of such exclusive screening provisions in its existing contracts.

stances oral argument on this motion would serve no useful

purpose.

It Is Therefore Ordered that the respondent's motion to modify the order to cease and desist herein and its request for oral argument thereon be, and they hereby are, both denied.

By the Commission, Commissioner ason dissenting, Commissioner Spingarn not participating. Mr. Mason dissented in accordance with the views expressed in his dissenting opinion accompanying the findings and order in this case.

SEAL .

D. C. Daniel, (D. C. DANTEL); Secretary.

.Issued : March 6, 1951.

CERTIFICATE OF SECRETARY (Omitted.in printing)

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1952.

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

versus

FEDERAL TRADE COMMISSION

On this day this cause was called, and after argument by Louis J. Rosen, Esq., for petitioner, and J. B. Truly, Esq., Attorney Federal Trade Commission, for respondent, was submitted to the Court.

OPINION OF THE COURT FILED

Filed February 21, 1952

IN. THE

United States Court of Appeals
For the Fifth Circuit

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, Inc., Petitioner, versus

FEDERAL TRADE COMMISSION, Respondent.

Petition to Review Order of the Federal Trade Commission, sitting at Washington, D. C.

(February 21, 1952.)

Before Holmes Borah, and Strum, Circuit Judges.

Holmes, Circuit Judge: This is a proceeding under Section 5 of the Federal Trade Commission Act, 15 U.S. C. 41, wherein the petitioner is charged with eligaging in unfair methods of competition in commerce by entering into long-time exclusive screening agreements. The defense is, first, a plea of res-judicata and, second, a denial that the alleged exclusive agreements have a tendency or effect unduly to lessen, restrain, suppress, or injure, competition in the distribution or exhibition of advertising films in motion picture theatres. The plea of res judicata was overruled by the Commission, and the case tried upon its merits.

There is no charge in the complaint of any combination or conspiracy; the sole charge is that the petitioner, individually, has been guilty of an unfair method of competition within the intent and meaning of the act. The Commission found the petitioner guilty as charged, and ordered it to cease and desist in the future from entering into theatre screening agreements for a term in excess of one year; and also to discontinue in operation or effect any exclusive theatre screening provisions in existing contracts when the unexpired term thereof extended for a period of more than one year from the date of the service of the cease and desist-order. Three separate and similar complaints were issued at the same time against three other corporations engaged in the same business. The cases were tried together under a stipulation that need not be fully stated here, but that was intended to avoid the necessity of having certain witnesses repeat their testimony.

Passing the question of res judicata, we proceed to a consideration and determination of the case on its merits. In the conduct of its business, the respondent enters into written screening agreements with exhibitors for a maximum period of five years, the majority being written for terms of one year or two years. About 25 per cent of petitioner's screening agreements are for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by petitioner, return such films at the end of the screening period, and that the petitioner will pay the exhibitor each month for screening as designated in the contract. A substantial number of the contracts provide that the exhibitor will display only advertising films furnished by petitioner, except slides for charitable or governmental organizations or announcements of the theatre's coming attractions. The available space for screening advertisements is limited, as only about 60 per cent of the theatres deept film advertising; in addition, theatre patrons resent the showing of too much of this character of advertising, and thus impose economic barriers on the amount that may be run. The time consumed that will be tolerated by the public is said to be from three to six minutes, or from two to four per cent of the time consumed by the show.

The Commission concluded that an exclusive screening agreement for a period of one year was not an undue restraint on competition, but that such agreement for a longer period should be prohibited. The record shows that there is free and open competition.

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from the beginning of the industry, distributors have sought and betained exclusive screening agreements. The Commission having letermined that exclusive agreements are not unfair or illegal per se but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person would invest sufficient capital in the business without assurance of exclusive screening space for a longer period than one year; and that theatres themselves frequently demand guaranties for a longer period, or otherwise refuse to exhibit motion picture advertisements. As pointed out by the dissenting member of the Commission, the prohibition runs to the length of the lease rather than to its terms. We quote further from the dissent as follows:

"To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theatres for the exhibition of respondent's trailer ads. . . Generally, people believe any form of advertising in a place of amusement is a bore and ought to be done away with. The small theatre owner benefits from trailer ads. He is paid to show them. Features, news reels, and shorts, cost him money. However, trailer ads actually reverse the flow of film money back into his own till.

"The order in this case prohibits the trailer ad maker from leasing screen time 'rom a theatre owner for a greater period than one year. If we could do this, it might be a great favor to audiences. Unfortunately, the privilege of boring the public for pay is a theatre owner's inalienable right, provided he

doesn't carry the thing too far.

"People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why andiences in small towns and communities sit quietly every hight whilst the community theatre parades a variety of commercial plugs across the screen.

"I do not believe we should prohibit a theatre owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants, provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theatre owners) may want to sell, namely a lease for more than one year.

... As I pointed out at the beginning, trailer ads are a source of income to small theatres. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income

which represents the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce.

"When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

"On the one hand we have litigation against a can company doing a fifth of a billion dollars worth of business a year (the biggest in the world), and controlling over 46 per cent of the 'competition' (if such it be) in the sale of cans. [United States v. American Can Co., 87 Fed. Supp. 18.] The majority opinion written to apply to the four companies sued states: 'The total number of exclusive agreements held by respondents in the aggregate approximated 75% of the total number.' To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify anti-monopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all others approximated 100% of the total industry."

It is self-evident, we think, that the theatre owner is entitled to choose his own distributor, and to sell, assign, lease, or give, his space for any purpose that he sees fit, subject to the police power of the state or federal government. In the instant case, because a large number of these films are transported in interstate commerce, the constitutional power of the United States to regulate commerce, and the statutes enacted in pursuance thereof, govern our decision. The ultimate determination of what constitutes unfair competition is for the court, not for the Commission; and the same rule must apply when the charge is that leases, sales, agreements, or understandings, substantially lessen competition or tend to create a monopoly. Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568-580.

The court must inquire whether the Commission's findings of fact are supported by substantial evidence; if so, they are conclusive; but as the statute grants jurisdiction to this court to affirm, modify, or set aside, any order of the Commission, it is our duty to examine the whole record; and, if from all the facts as found by the Commission, it clearly appears that no additional fact-findings are necessary and that, in the interest of justice, the

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controversy should be decided without further delay, the court has full power under the statute to decide the case and to affirm, modify, or set aside the order under review. 15 U. S. C. A. 45(c) Cf. Universal Camera Corp v. N. L. R. B., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. —

The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites to the power of the Commission to issue its order in this case to cease and desist. Cf. Federal Trade Commission v. Raladam Company, 283 U. S. 643, 646, 648.

In another aspect, we have here a contract of agency, and our decision is governed by Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or yendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or huilding where the sign is erected by the advertiser, and the owner merely grants the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement; and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period.

If it appears at any time in the course of a proceeding such as this that it is not in the public interest, the Commission should dismiss the complaint. If the Commission fails to do it, "the court should, without inquiry into the merits, dismiss the suit." Federal Trade Commission v. Klesner, 280 U. S. 19,30, 68 A. L. R. 838, 846. We have not exercised this power but have decided the case on its merits, though it does not appear to be in the public interest to increase the number or amount of advertisements of this character. The Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change the definition of unfair methods of competition as laid down by the courts prior to its enactment. Federal Trade Commission v. Klesner, supra.

Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic

3

tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

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Therefore, with available space and time for advertisements on the screen of motion-picture exhibitors severely limited, and with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening. of their prospective advertisements, we conclude that petitioner's method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. Goldberg v. Tri-State Theatre Corp., 126 F. (2) 26; United States v. Western Union Telegraph Co., 53 Fed. Supp. 377; State For Use of Independence County v. Tad Screen Advertising Co., 133 S. W. (2) 1.

It is so ORDERED.

JUDGMENT

Extract from the Minutes of February 21, 1952.

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

FEDERAL TRADE COMMISSION.

This cause came on to be heard on the petition of Motion Picture Advertising Service Company, Inc., to review an order of the Federal Trade Commission, issued October 17, 1950, "In the matter of Motion Picture Advertising Service Company, Inc., No. 5498," and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the cease and desist order of the said Federal Trade Commission in this cause be, and the same is hereby

set aside and the complaint dismissed.

CLERK'S CERTIFICATE,

United States of America,

*UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 146 to 156 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals, for the Fifth Circuit, in a certain cause in said Court, numbered 13493, wherein Motion Picture Advertising Service Company, Inc., is Petitioner, and Federal Trade Commission, is Respondent, as full, true and complete as the originals of the same now remain in my office.

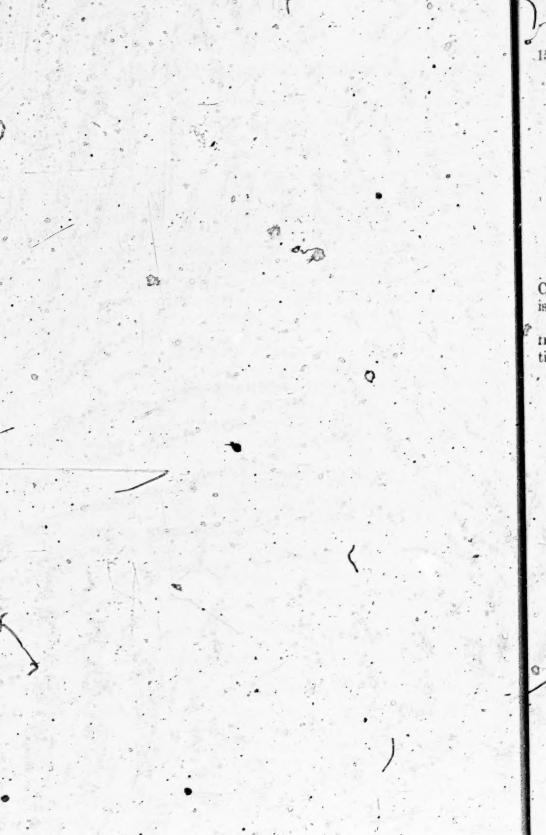
I further certify that the pages of the printed record numbered from 1 to 145 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 6th day of May, A.D. 1952.

OAKLEY F. DODD, Clerk

By Vs/ J. A. FEEHAN, JR., J. A. FEEHAN, JR., Chief Deputy Clerk, U. S. Court of Appeals, Fifth Circuit.

(SEAL)



Supreme Court of the United States

No. 75, October Term, 1952

FEDERAL TRADE COMMISSION, PETITIONES

Motion Picture Advertising Service Company, Inc.

Order allowing certiorari

Filed October 13, 1952

the petition herein for a writ of certiorari to the United States art of Appeals for the Fifth Circuit is granted. The case ansferred to the summary docket.

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a shall be treated as though filed in response to such writ.

VOLUME II TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

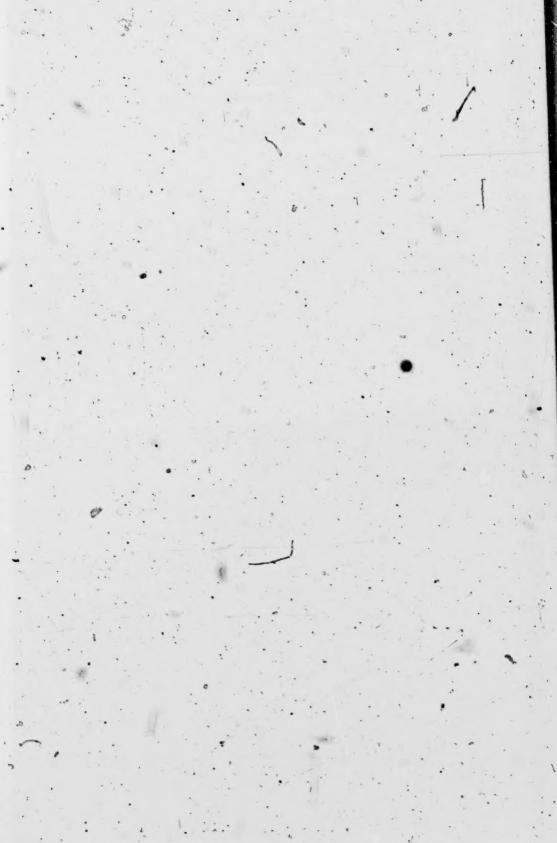
No. 75

FEDERAL TRADE COMMISSION, PETITIONER

MOTION PICTURE ADVERTISING SERVICE COMPANY?

ON WRIT OF CHRISTIANI TO THE UNITED STATES COURT OF

CERTICHARI GRANTED OUTOBER 15, 1952



IN THE

United States Court of Appeals

No. 13,493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.,
PETITIONER

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· FEDERAL TRADE COMMISSION,

RESPONDENT

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION, SITTING AT WASHINGTON, D. C.

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In the Matter of MOTION PICTURE ADVERTISING SERVICE CO., INC.

Docket No. 5498

PORTIONS OF THE TRANSCRIPT OF TESTIMONY TAKEN AT VARIOUS HEARINGS

[12] Mr. Rosen: Counsel for Respondent offers in connection with the plea of res adjudicata two letters, the first being a letter from Delos C. Johns addressed to Mr. Everett F. Haycraft, dated August 6, 1943, which I will mark Respondent's Exhibit 1-A and 1-B for identification.

(The letter referred to was marked Respondent's Exhibit 1-A and 1-B for identification.)

Mr. ROSEN: The other is a letter from Mr. Johns addressed to Louis L. Rosen, Stan D. Donnelly and [13] Tom M. Burgess, dated August 12, 1943, which I will mark Respondent's Exhibits 2-A and 2-B for identification

(The letter referred to was marked Respondent's Exhibits 2-A and 2-B for identification.)

Mr. ROSEN: In connection with the offer of said two letters, Counsel states that both of them were submitted to Mr. Haycraft yesterday. He stated he recalled the matter and that the statements made by Mr. Johns in the letter of August 12th with reference to a telephone conversation with Mr. Haycraft correctly set forth the facts.

Trial Examiner HIER: Mr. Collins, do you have any objection to those letters?

Mr. Collins: I object to the introduction of them. I don't make any objection as to the identity of the letters and I don't make any objection as to the statements made with reference to Mr. Haycraft's statement, because I will admit that Mr. Haycraft says that the

letters set forth substantially what the conversation was.

Trial Examiner HIER: What is the ground of your

objection?

Mr. Collins: I object to the admissibility of the letters for the simple reason that Mr. Haycraft hasn't got the authority and didn't have the authority at the date of these letters, and he hasn't got the authority today, to

speak for or on behalf of the Federal Trade Com-

[14] mission.

Mr. Rosen: The issue involved in the plea of res adjudicata is simply whether or not the issue presented in the present case was presented in the former proceeding against this same Respondent. There is some ambiguity and doubt as to whether or not the former proceeding embraced the same complaint that is here made, and in my opinion, the correspondence that has been offered here clears up any possible ambiguity as to whether or not this issue, as to the right to enter into exclusive contracts, was an issue in the former proceeding and was considered by the Commission in that matter. Now it does seem to me that the attorney in charge in his statement on this subject would help to clear up that ambiguity.

Trial Examiner HIER: Let's see if I have got this straight. You have got to have identity of parties and identity of issues to sustain this plea. The identity of parties is, of course, unquestioned. The identity of issues is in question. On the face of it, the complaint before you is a conspiracy combination complaint, charging fixation of these rates by conspiracy between you four and others, and the exclusive contracts which were individually used were brought in as implementing that conspiracy. The order, as I read it, is confined to collective action, cooperative action. The only point at issue, if I understand your answer in the former case,

is whether or not the attorney for the Commission.

[15] at that time, Mr. Haycraft, put in issue in the case by his brief the further question of whether or not the parties in that case could individually use

these exclusive contracts.

Mr. Rosen: Precisely.

Trial Examiner HIER: And the record in the case does not disclose whether or not the order, by ignoring that portion of his brief, considered it on the merits and rejected it or considered it outside the scope of the complaint.

Mr. Rosen: You stated it precisely.

Trial Examiner HIER: Now if they did the former, you may have something to argue about; if they did the latter, they are out of court, so to speak. I think that is the point, as I gather it, and since I can't pass on this matter and only the Commission can, I think that I should admit these exhibits, Mr. Collins, and let the body who is passing on the merits of that plea accept or reject this evidence.

I have some question in my mind as to whether it belongs in this record or whether it shouldn't more properly be attached to your application or brief on the point, but you want to get it of record in the Commission somewhere.

Mr. ROSEN: The reason for getting it in the record somewhere is so that I can argue it. I don't want the

Commission later when I argue it to say it isn't in the case. Otherwise I would have to take the testimony of Mr. Johns and Mr. Haycraft, and I wanted to obviate that.

Trial Examiner HIER: For those reasons and for that purpose, I will overrule the objection and accept these documents as Respondent's Exhibits 1-A and 1-B and 2-A and 2-B in this case.

(The documents referred to, heretofore marked for identification as Respondent's Exhibits 1-A and 1-B and 2-A and 2-B, were received in evidence.)

Mr. COLLINS: I would like to take exception to the ruling of the Trial Examiner on that point.

[76]. T. B. GRINSPAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Q/ (By Mr. COLLINS:) Mr. Grinspan, will you please

state your name and address and spell your name.

A. T. B. Grinspan, G-r-i-n-s-p-a-n, 1700 Keo Way, Des Moines.

Q. Mr. Grinspan, in what business are you engaged?

A. Engaged in the production of film advertising, theater trailers and industrial film 1635.

Q. How long have you been so engaged?

The Company has been in business twenty-eight or twenty-nine years. I have been there ten years.

Q. You have been connected with the Company about

ten years?

Right.
What is the name of the Company? [77]

A. There are two companies, Parrot Distributing Company and Parrot Films Studio.

CROSS-EXAMINATION [85]

Q. (By Mr. DONNELLY:) Mr. Grinspan, you mention the peak of your business. When was that?

You mean on library films?

Q. Well, let's say those first, yes.

1938 to 1939.

And do you intend-is it in your answer on direct when you said "peak", the peak of all your business?

The volume declined greatly during the war. There was an extreme shortage of film and the [86] business has been building up in 1946 and 1947.

REDIRECT EXAMINATION [87]

Q. (By Mr. COLLINS:) Mr. Grinspan, when was the peak of the business, would you say, in the library film business?

A. 1938 and 1939. After that it started to drop off.

Q. It started to drop off after 1938 and 1939.

Now, was the dropping off of your business caused by the lack of available films?

A. I am in no position to state definitely what caused the dropping off so far as my personal knowledge is concerned.

Mr. Donnelly: In view of the answers of the witness thus far I object to any further answers as being speculative and hearsay.

Trial Examiner Kolb: Sustained.

[156] Q. To the best of your recollection, the theater managers told you they were under exclusive contract with United?

A. Well, I wouldn't say whether it was United or Alexander in that case. I don't remember; I don't recall, one of the two of them. In fact, the only competition that I saw was the Alexander and United in my territory. That is all I ever ran into was United or Alexander, one of the two of them.

[231] W. B. REICHART was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. COLLINS:) Mr. Reichart, try to keep your voice up so the reporter can hear what you say, whether any of the rest of us do or not. Mr. Reichart, where do you live?

A. Baytown, Texas.

Q. And how long have you lived there?

A. Two years.

Q. Where did you live before that?

A. In Houston, Texas.

Q. In what business were you engaged?

A. Theatre advertising.

Q. Now long have you been engaged in that business?

A. Seven years.

Q. You began, then, in 1941?

A. 1941.

Q. And wher you started in the film advertising business, did you start in by yourself, or were you employed by someone?

A. I was employed in 1939 by Alexander,

[232] Q. How long did you work for Alexander?
A. Approximately one year.

.Q. What were your duties with Alexander?

A. Soliciting advertising from the theatres for Alexander.

Q. Did you make any contracts with the theatres?

A. Yes, sir.

Q. For what purpose?

A. For taking good will, and any new theatres that were being put up, to secure or obtain contracts for Alexander so we could sell motion picture advertising.

Q. Now, after you left Alexander, what did you do?

A. I went in business for myself, selling motion picture advertising.

Q. Now, after you left Alexander, explain to us just

the nature of your business, Mr. Reichart.

A. The nature of my business was to obtain theatre contracts from theatre owners for the privilege of selling advertisers film advertising to be displayed on their screens.

[235] Q. Now, why did you stop showing films at the Mitchell Lewis Theatres?

A. I was told in 1945 that he had signed a contract with M. P. A.

[236] Q. Now, did you ever have any business relationship with the Jefferson Amusement Company?

A. Yes.

Q. Is that a chain of theatres or one?

A. It is a chain.

Q. How many theatres?

A. Forty some odd.

Q. I beg pardon?

A. Forty some odd.

Q. Where are they located?

A. In East Texas, Louisiana, and South Texas.

Q. Did you ever have any film advertisements screened on the screens of the Jefferson Amusement Company theatres?

A. Yes, sir.

Q. For what period of time?

A. Two or three weeks at a time.

Q. And during what years?

A. I would like to ask a question on that, to refresh my memory only, and state that that was before M. P. A.

got that contract-I don't know whether you got

[237] that contract in '45 or '46?

Q. It was in '45. So until 1945, then-No, not from 1941.

Q. Well, when did you begin?
A. In '44 or '43 with Jefferson

In '44 or '43 with Jefferson. Q.

Now, do you recall how many theatres of that chain you screened advertisements at?

A. I think it was only two or three.

Only two or three. Now, when did you say that you stopped-in what year?

A. In 1945.

Now, can you tell us the reason you stopped?

The reason I stopped was because M. P. A. had the contract.

Q. Where did you get that information?

From the Jefferson Amusement officials.

Located where?

A. At Beaumont, Texas. Sam Landra is his name.

Q. And what was his position with the Jefferson Amusement Company?

A. Vice-president.

Q. And how did you contact him-by mail, or how?

A. I contacted him by telephone.

By telephone. And do you recall what the conversation was-what you said to him?

A. Not word for word, but I remember that I did have some film to show at some of their theatres in/the Tri-Cities and he told me he was sorry, he couldn't show them, I would have to take it up with M. P. A., because he had given the contract to M. P. A.

You said something about the Tri-Cities. , What are the Tri-Cities?

Baytown, Goose Creek, and Peily, Texas.

Q. Baytown, Goose Creek, and what?

A. Pelly-now known as Greater Baytown.

I believe you said that you are not in the film advertising business now?

I am not active in it.

Q. Why aren't you actively in it, Mr. Reichart?

A. I did not have enough theatres to make any money.

Q. You did not have enough theatres?

A. No.

Q. Have you tried to get the theatres?

A. Not in the last year, because I was aware of the contracts—being a tradesman and in the business, I was aware of these contracts, and I felt the contracts were vital.

[239] CROSS-EXAMINATION

Q. (By Mr. Rosen:) Mr. Reichart, had you any previous experience in motion picture advertising business before you went to work for Alexander in 1939?

A. Not to the extent of actually participating in the manufacture of motion pictures, but I had been in advertising work, and had been for some time in the agency advertising business. I know the advertising

situation.

Q. As I understand it, sir, there are three important phases to this business—see if I am not correct? One is the securing of advertising contracts from advertisers; second, is the production of the advertising films to be displayed, and third, is the securing of screen privileges from theatres whereon the films are to be displayed for the benefit of the advertiser? Is that correct?

A. That constitutes the siness, but I would say the number one subject would be the securing of the theatre.

Q. I was not trying to put them in the order of importance, but merely to state that the screen advertising business comprises those three main elements—is that correct?

A. That is correct.

Q. Some screen advertising companies engage in one or more phases of that business—is that right?

A. State that again.

Q. Withdraw that. Let me rephrase it. Some companies engage in the business of merely obtaining advertising from the advertisers and restrict their activity to that one phase—is that correct?

A. I have heard of such companies.

Q. And those concerns obtain their compensation either by getting a commission on the advertising sold or by getting paid by the advertiser, some rate of compensation for their services?

A. That is correct.

Q. Other companies engage solely in the production of films—advertising films or other films—is that correct?

A. That is correct.

Q. And there are other concerns, such as Motion Picture Advertising Service Company, engaged in all three phases of the business?

A. That is correct.

Q. Is there any advantage to the distributor, such as courself or M. P. A., to obtaining a contract from a theatre under which the distributor and the distributor alone is the one, during the time of the contract, that would have the right to display motion picture advertising on the screen?

[241] Mr. COLLINS: I object.

Trial Examiner Kolb: Just a minute—what connection does that have with the theory of your defense. Mr. Rosen?

Mr. ROSEN: If the Trial Examiner please, the Government's charge in the complaint against us is that we have violated Section V of the Federal-Trade Commission Act, in that we have obtained exclusive film agreements-that this constitutes unfair competition, and the prayer is that a Cease and Desist Order be obtained restraining the Respondent from obtaining exclusive theatre screen agreements. I think it is pertinent to the inquiry to eascertain the nature of this business the practical effect of the way the business is now being run and the practical effect of such a Cease and Desist Order on the screen in general. How can the Federal Trade Commission possibly determine whether such a contract as it denounces here is unfair competition unless it first knows the nature of the business, the result that would be created by the prohibition of such a condition in a contract on both the theatres and the distributors? I submit it is perfectly wrong. After all, it is up to the Commission to make up its mind if such a clause is legal, but in order to make up its mind it must find out what the effect is on the industry.

Trial Examiner Kolb: Whether a contract would be advantageous to a theatre or not, I don't think would be material; furthermore, this witness is not qualified to answer that question. The objection will be sustained.

Q. (By Mr. ROSEN:) Mr. Reichart, is it not a fact that in your experience in this business, all of the theatres limit the amount of screen advertising to be displayed on their screens?

A. Yes.

Q. Why so?

A. Because with too many screen ads it has been proven that it annoys the paying customers who pay to get in the theatre, not to see the ads but to see the picture itself, and the prime interest of the theatre man is not to display advertising but to exhibit motion pictures.

Q. Does that limitation on the part of the advertising films vary with the different theatres involved?

A. Yes; each owner will have a right to make up his mind which will be and which will not be the definite amount of advantage.

Q. Would you say it will run, on the average, about four films per performance?

A. It has been proven over the years that the average theatre would like to have no more than four.

Q. In the cases where a theatre undertook to [243] make a theatre screen agreement with more than one distributor at the same time, wouldn't it be probable that the distributor would be shipping in films to be displayed after making contracts with the advertisers for the display of the film, after producing or having produced for it the film and then find that the other distributor or others with theatre screen agreements had filled the screen so that those films could not be displayed that week, or that performance?

m

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af

Mr. Collins want to object to that.

Mr. Rosen: Maybe my question was a little long.

Trial Examiner Kolb: It was rather involved-I will

say that.

Mr. Collins: I think I understood the question. It is not a question of what the probability may be, or anything of that kind. It is my contention that those things have nothing to do whatever with the issues in this case—their likes or dislikes of any parties—the advantage or disadvantages to any party, because the law has determined that such things are a violation of the law, and it does not say a thing in the world about the advantages or disadvantages involved.

Trial Examiner Kolb: We have had a lot of testimony as to the method of operation and, in view of that, I consider a question as to the difficulties involved in two

contracts in one theatre as being competent. The

[244] objection will be overruled.

Q. (By Mr. Rosen:) If you can answer my question without my rephrasing it—if you understood it?

A. I can answer it.

I wish you would do so.

A. I would say, from my experience over these years, which are seven or eight, that it is disadvantageous to every one concerned.

Q. For what?

A. For a position to exist where a theatre has more than one contract with distributors unless that theatre specifies in his contract that the distributor who obtains the contract with the theatre will only be allowed so many ads per week and the dates specified.

Q. As I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous for all concerned—meaning everybody—the theatre and the distributor?

A. And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought it, in fact.

Trial Examiner Kolb: Counsel, you are getting away from the line of questioning I allowed that on. It is

not a question of advantage or disadvantage to [245] the theatre or anybody else—you can ask him about that, but when you are asking that at this time, you are getting into the conclusion of the witness. I do not think it is proper.

Mr. ROSEN: I will try to limit myself to the facts.

His conclusion is naturally based on the facts.

Q. (By Mr. ROSEN:) What are the practical difficulties, in so far as the distributor is concerned, if he has to display advertising films on a screen which has contracts at the same time with other distributors?

A. There would not be any difficulty at all—like I stated, if the space would be available, but he would know whether or not the space would be available in

advance.

Q. And if the space had been filled up, by one of the other distributors, what would be the result of your efforts in such a case?

A. I would have to wait—I would have to ask the advertiser if he would take another week. If he would, I would display the ad then; if not, I would have to cancel the order.

Q. Would the contract with the advertiser require the display of the film over a particular period of time?

A. Yes, sir.

Q. So that in such a case, if the theatre screen was filled with other advertising of other distribu-

[246] tors, that contract with the advertiser would have to be broken, would to not?

A. Yes, sir.

Q. When you said a moment ago that it was disadvantageous to the advertiser; that, no doubt, is what you meant?

A. That is correct.

Q. Similarly, would it not be disadvantageous to the particular distributor who had expended the effort of selling the advertising, made up the films, paid the advertising commission, and then found that he could not have those films displayed in a particular performance or a particular week.

The WITNESS: Please read the question,

(Question read by the reporter, as above recorded.)

A. Under those circumstances, if that distributor would be working, I would say that would be at his own risk.

Q. It would be at his own risk, but undoubtedly in some cases he would conflict with others and could not

get the advertising display at the time he wanted.

A. It would be free enterprise—that would just be

the chance hel would be taking.

Q. I asked you a question, though, Mr. Reichart, whether it would be disadvantageous to the distributor in such circumstances?

[247] A. I beg your pardon.

Q. I understood you to say that it was disadvantageous in your opinion, to all concerned. I was trying to show the practical difficulties of doing business in the way the Government suggests it be done.

A. I say it would be a disadvantage to the distribu-

tor; yes.

Q. For the reasons I have stated?

For the reasons that the testimony is bringing out.

Q. Sir?

A. For the reason that the testimony shows.

Q. Now, taking up the practical difficulties with regard to the theatre itself, if, as you say, the theatres or most of them limit the advertising to four films per performance, what is the disadvantage or practical difficulty to the theatre in doing business with more than one distributor at the same time?

Ac He makes enemies in the majority of cases because the advertisers, 90 per cent. of the time are his neighbors, attend his theatre, it would be an embarrassment to the advertiser and the theatre man, because the theatre man, himself, just wouldn't know what it was

all about.

Q. Suppose the theatre man should get in from each of these five distributors three films per performance and he would be limited to four per performance, then

he would have fifteen on hand-how many would

[248] he show?

Mr. Collins: Mr. Examiner, that is just going beyond all reason. I object.

Trial Examiner Kolb: The objection will be sustained. Mr. Rosen: I submit it is proper cross-examination.

Trial Examiner Kolb I don't know where you are

leading up to.

Q. (By Mr. Rosen:) Mr. Reichart, you have been in this business from 1939 up until when—1947?

A. That is correct.

Q. Has there or has there not been free competition in the securing of theatre screen agreements?

Mr. COLLINS: I want to object to that.

Trial Examiner Kolb: The objection will be sustained. That is the question which the Commission is going to have to decide.

Mr. ROSEN: I can go into the fact-that was merely

introductory to a question.

Trial Examiner KOLB: The witness is not qualified to state that.

Mr. ROSEN: This is cross-examination—he is not my witness.

[249] Trial Examiner Kolb: You can question the witness, but that question is not competent.

Q. (By Mr. ROSEN:) Mr. Reichart, I will get at it another way. You have stated that you handled, among other things, that part of your business was in connection with the securing of theatre screen agreements, did you not?

A. That is right—I did.

Q. What considerations moved the theatre to give you a contract over that of your competitors?

Mr. COLLINS: I object to that.

Mr. ROSEN: That is certainly an issue of facts.

Trial Examiner Kolb: Read the question.

(The pending question was read by the Reporter.)
Trial Examiner Kolb: The objection will be sustained.

Q. (By Mr. ROSEN:) When you went in to secure theatre screen agreements, were those contracts made upon the basis of so much per advertisement or were they made by you on the basis of some guarantee over a given period of time?

A. On a per ad basis so much per ad.

Q. Did your ever, in your experience, have any con-

tracts under which you guaranteed a minimum consideration to the theatre?

A. No.

[250] Q. Was that in all of the contracts that you made with theatres in which you were paying the theatre a certain rate per advertisement, the amount that would be due the theatre would depend upon the number of ads that you could sell for that theatre during the period of the contract, would it not?

A. That is right.

Q. And if you sold four ads, they got paid at that rate, and if you sold no ads, they got no consideration—is that correct?

A. That is correct.

Q. In your experience with this business, were there any contracts made in the industry under which the theatre was guaranteed a certain amount, irrespective of whether advertising was sold or not by the distributor?

A. Yes.

Q. and those were minimum quantities, weren't they?

A. I don't know what you mean by "minimum".

Q. I mean that the theatre got the guarantee, whether one or more ads were sold?

A. That is correct.

Q. I notice that you stated that in connection with the Jefferson Amusement Company, which had forty theatres, that you exhibited motion picture advertising

in three of the forty-did I get you right?

[251] • A. That is correct.

Jefferson Amusement Company on the other thirty-seven?

A. Yes.

Q. Had you already sold advertising for those thirty-seven theatres?

As No.

- Q. What kind of a contract was it you tried to obtain from that concern—the circuit?
- A. I tried to obtain any sort of a contract, on a per ad basis or a guarantee.

Q. And they let you exhibit advertising in three, but

not in the other thirty-seven?

A. At the time that I was allowed to exhibit this advertising, the Jefferson Amusement Company had consummated their contract with Alexander, who previously had the contract before M. P. A., and the time that I exhibited was time elapsed between the Alexander contract and the M. P. A. contract. At that time, it was just a matter of courtesy, that they would allow any one to run an ad on their theatre.

Q. Did you ever make an attempt to secure screen privileges with that circuit after you saw Alexander's contract had expired?

A. Yes.

[252] Q. For the whole circuit?

A. Yes.

Q. But not offering to pay them any guarantee for the whole forty theatres?

A. Not as much as they wanted.

Q. Not anything?

A. Yes.

Q. What was the basis you offered?

A. Three dollars per ad basis for all their theatres with a guarantee of three and an option for four.

Q. State that again. Now, repeat that for me as to what your guarantee meant, so I will understand it.

A. I would guarantee three ads per week per theatre, with an option to put one or more ads, which would make four which they would take, and pay at the same rate, or \$3.00 for the additional ad, and the total would be \$12.00 per week per theatre.

Q. And that was the minimum, whether you sold

any more or not?

A. Yes.

Q. For the whole circuit of theatres?

A Yes, sir.

Q. What did they want?

A. \$7.50.

[253] Q. You were not willing to meet that?

A. No, Sir, I was not willing to meet that.

Q. Was there any other case that comes to your mind in which you tried to secure the theatres on some exclusive basis by offering a guarantee?

A. Yes.

Q. I don't mean this circuit—any others?

A. Yes-Long.

Q Long?

A. Yes.

Q. How many theatres did they have?

A. I don't remember.

Q. Just give us an approximation?

A. About forty-five-approximately thirty.

Q. What did you offer them?

- A. \$3.50 with the exception of the Metropolitan Theatres; I offered them \$5.00 on the Metropolitan Theatres.
- Q. Was that subsequent to the time they had contracted with Alexander?

A. Yes.

Q. Why did they turn you down?

A. They wanted more money.

Q. Was Alexander paying them more money?

A. At that time M. P. A. had the circuit—I think you had a split with them—a split service.

Q. What I mean to say is this—were you going in and offering to pay the theatre more money than they were getting or less money?

A. Less money than they were getting.

Q. So, in other words, they would not give you the theatre screens because your offer was less than what they were getting?

A. That is right.

Q. And the same thing is true with the efferson Amusement Company—they were able to secure more money from your competitors than you were willing to pay, and for that reason they would not give you the forty theatres—is that right?

A. That is right.

Q. And it is to your knowledge, is it not, that the two distributors whose cases are being tried here today, Alexander and M. P. A., are in open and free competition

with each other for these very screens that you have been talking about?

Mr. COLLINS: I object to that.

Trial Examiner Kolb: Read the question.

(The pending question was read by the reporter.)

Off the record.

Trial Examiner KOLB: The objection will be sustained.

(Discussion off the record.)

Q. (By Mr. ROSEN:) Mr. Reichart, in the [255] cases which you have tried to secure screens for your own company, is it or is it not a fact that Alexander has been in competition with you for the obtaining of those screens?

Mr. COLLINS: I object to that.

Trial Examiner Kolb: The objection will be overruled.

Mr. ROSEN: You can answer the question.

A. Yes.

Q. Is it also true that M. P. A. has been in competition with you for the obtaining of those screens?

A. Yes.

[256].

Q. Is it also true that all three of you have been in a competition with each other for those screens?

A. To the best of my knowledge, it is true.

Q. And the theatre makes up its mind, so far as you know, to give the contract to the one that offers them the most money or the best service, or both—isn't that true?

Mr. COLLINS: I object to that.

Trial Examiner Kolb: The objection is sustained

The WITNESS: I think-

Trial Examiner KOLB: The objection is sustained.

The WITNESS: Pardon me.

Q. (By Mr. Rosen) Have you ever had occasion to offer M. P. A. advertising which you had obtained for exhibition on theatre screens under contract to M. P. A.?

A. Yes. .
Q. Have they refused to exhibit the films?

A. Not when possible.

Q. By that, I assume that you mean that when the theatre screens were filled up for the particular time

you wanted, they refused; but at other times, accepted

the advertising?

A. I would leave it to their integrity and the fact that they did not have the space outside of that, I would know if they were trying to keep me off.

Q. Weren't there numerous times when they ac-

cepted the advertising?

A. That is right.

Q. And only the exceptional case was when they turned it down?

A. That is right.

Q. And those cases, when they turned it down, they told you it was because their theatre screens were filled?

A. That is correct.

Q. And in the cases in which they did exhibit the advertising that you wanted exhibited, you were paid the customary commission, were you not, of 15 per cent. less 2 per cent. discount—I should say, plus the 2 per cent. discount?

A. I was allowed that commission.

Q - Isn't that the usual advertising commission in the industry?

A. That is the usual advertising commission

[257] in the industry.

[261] RECROSS-EXAMINATION

Q. (By Mr. Rosen:) Mr. Reichart, I understood, on Redirect Examination, that there was a question asked by Mr. Collins in which you said you did not think you could answer it fairly unless he pointed out whether he was talking about M. P. A. or Alexander in connection with your inability to screen the advertising for certain clients of yours. Did you not say that?

A: That is correct.

Q. Am I to understand from that statement [262] that you had to know what company he was talking about? That you meant—suppose you state the explanation of it—in other words, with regard to M. P. A., what would you have to say on that question?

A. Is that a fair question?

Q. I want the record to be fair.

A. Yes, I know what you are trying to state there. I never had that experience with M. P. A.

Q. What kind of an experience?

A. They never turned me down, like I have testified here before, that I always believed that they would give me the privilege of screening an ad provided they had space on a theatre where they had a contract.

Q. Let me ask you another question, Sir. It it not a fact that when you went out and did business directly with the theatre and got contracts to screen advertising, that you sold the advertiser, that you were limited in that case to the particular theatre which gave you the screen privileges—is that right?

A. You are asking if I was limited to the theatres

where I had contracts?

Q. In those cases in which you got the screen privileges and then showed the ads, you were limited to the exhibition of those ads on the particular screens you had secured?

A. That is correct—to a point.

[263] Q. When you undertake to exhibit those films on screens that M. P. A. had, what wider circulation, in that they had more screen contracts than you had?

A. That is right.

Q. And, therefore, could you render a better service for your advertiser by getting him a wider distribution than you, yourself, could secure with your limited or-

ganization?

A. That would be true except in knowing whether or not space would be open in any theatre where M. P. A. had the contract, I would first have to confirm it with them, which would be a disadvantage—I would first have to confirm it with M. P. A. and if they confirmed it, then I could run the ad.

Q. And you had to find out from the theatres whether

they would screen the advertising for you?

A. I would know that because I had the contract with that theatre.

Q. With those non-exclusive contracts that you had?

A. That is right.

Q. Could you not, under those non-exclusive contracts, know whether other distributors had preempted the screens?

A. Not unless we kept up with that with the theatre owner.

Q. In that case, wouldn't you have to find out from the owner whether there was room for your ads?

A. Yes, sir.

[264] Q. And in the latter case you would have to find out from M. P. A. whether they had room for your ads?

A. That is right.

Q. I would like to show you a letter written by you to Mr. Mabry, of Motion Picture Advertising Sales Company, dated October 19, 1945, which I will ask to be marked for identification Respondent's Exhibit 1, Docket 5498

(The letter referred to was marked Respondent's Exhibit 1 for identification.)

Q. (Continuing) I will ask you if that is a letter which you wrote to Mr. Mabry, of Motion Picture Advertising Sales Company, on October 19, 1945?

A. That is right.

Q. In whose handwriting is the writing at the bottom of the typed letter?

A. That is mine.

Mr. ROSEN: On behalf of Respondent, I offer to introduce and file in evidence Respondent's Exhibit No. 1.

Trial Examiner KOLB: There being no objection, the letter will be admitted as Respondent's Exhibit No. 1.

(The letter referred to, heretofore marked for identification Respondent's Exhibit 1, was received in evidence.)

Q. (By Mr. Rosen: Mr. Reichart, I notice [265] that in the letter you say: "Thank you very much for your kind letter giving us permission to run our trailers on screens controlled by you." Then, in the next paragraph, there are listed the names of the towns, and there are several, in the letter, that speak for themselves—did you at any time have available for

the advertising that you sold, those particular towns mentioned in this letter?

A. No.

Q. So that those referred to in the letter were not towns in which there were theatres that you have had contracts with?

A. No; I never had any contract with these theatres.

Q. And in the place mentioned, the advertiser, Fresh Air Circulating Fan Company, wanted its advertising displayed in theatres in the towns mentioned?

A. That is right.

Mr. POSEN: That is all.

[268] ROBERT WEIGAND was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. COLLINS) State your full name, please. .

A. Robert Weigand.

Q. Mr. Weigand, what connection, if any, do you have with the Commerce Picture Sales, Inc.?

A. Vice-President.

Q. How long have you been connected with Commerce Picture Sales, Inc.?

A. Since its beginning, August, 1941.

Q. And what is the nature of the business of the Commerce Picture Sales, Inc.?

A. The production and distribution of motion pic-

tures for advertising and some other purposes.

Q. Now, in connection with the production and distribution of advertising films, just what does the Commerce Picture Sales, Inc. do?

Well, we produce a library of films for the use of advertisers in a general way. We con-

tact theatres for the privilege, and obtain from the theatres the privilege of exhibiting advertising films on the theatre screens.

And then, we contact the advertisers and obtain contracts with these advertisers for the purpose of rendering a service of exhibiting the films on the theatre screens with whom we have contracts or other agree-

ments permitting us to do that.

We do other production to render the service distinctive to e advertiser.

Q. In what territory does the Commerce Picture

Sales, Inc., operate?

A. Our production takes place in and close to the

city of New Orleans.

Our theatre contracts and distribution, that sales efforts take place in Louisiana, Mississippi, Oklahoma, Arkansas, Alabama and Florida, either directly through our own salesmen or indirectly through a distributor.

Q. Now, when you say indirectly through a distribu-

tor, do you have more than one distributor?

A. We have only one distributor at the present time.

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CROSS-EXAMINATION

Q. (By Mr. Rosen:) Mr. Weigand, how old are you?

A. I am forty-eight.

Q. Did I understand that you have been engaged in the Motion Picture Advertising Business since 1934, did you say?

A. Shortly thereafter, either '34 or '35, I believe.

Q. Your first contact with that business was as an employee of the Motion Picture Advertising Service as Sales Manager?

A: That's right.

Q. In the capacity of City Sales Manager?

A. Yes, sir.

Q. For the City of New Orleans?

A. Yes, sir.

Q. You stated you were with that company, did you say, until 1939?

A. That's my recollection.

Q. And then went into business in the same line of business?

A. Yes.

Q. When you first left that company, what was the nature of the business that you established; the same as you are now operating?

A. Very largely the same, although we did not at

that time have a library of films. We made special films and we made no attempt to maintain a library of films.

[280] We also did other motion picture production work separate from the advertising field.

Q. Just for the sake of the record, would you mind

explaining what is a library film.

A. Well, a library film, from my understanding, is a film that can be used by several advertisers when it has been added to by a commercial ending, identifying it with a particular advertiser.

Q. Am I to understand that that is a film which would be useful in a certain line of business like a drug business or maybe a dry goods business or some similar business and by adding the name of the advertiser where you advertise the subject matter. It is general and can be used for more than one advertising?

A. That's right.

Q. So, when you started out then in your own business, you did not manufacture library film but did engaged in the business of securing advertising contracts from advertisers?

A. Yes.

Q. Screen privileges from such theatres as your company secures?

A. Yes.

Q. And manufacturing films and servicing those contracts?

A. Yes.

- Q. Screen privileges from such theatres as 281] your company secures?
- Q. And manufacturing films and servicing those contracts?

A. Yes.

Q. With the exception of the beginning, library films that you didn't manufacture?

A. That's right.

Q. In order to secure screen privileges for the purpose of servicing your advertising contracts, you undertook to go to the owners of the theatres or theatre chains and tried to secure contracts for screen privileges, did you not?

A. That's right.

Q. I venture the assertion that in some contacts that you made with the theatres, you found that they were already under contract with some of your competitors, is that right?

A. Yes.

Mr. COLLINS: I object to that.

Trial Examiner KOLB: I don't believe that is within the scope of the direct. I will sustain the objection; strike the answer.

Off the record.

(Discussion off the record)

Trial Examiner KOLB: On the record.

Q. (By (Mr. ROSEN:) You were afforded, [282] were you not, Mr. Weigand, ample opportunity

to make any bid that you wanted for those theatres, and offer the theatres the films that you produced; submitted to them any literature or argument to enable you to secure those film rights, were you not?

Mr. COLLINS: I am going to object to that. I submit

that is more than double barrels fired at once.

Trial Examiner Kolb: Did you understand the question, Mr. Witness?

The WITNESS: I understand the question, but it would be hard for me to answer.

Q. (By Mr. Rosen:) I will restate my question, Mr.

Weigand.

Has/it been your experience in securing the screens in the theatres, there is free competition among you and you competitors in order to get the screen—

Mr. Collins: I object to that.

Trial Examiner KOLB: The objection will be sustained

Q. (By Mr. ROSEN:) You have stated in your direct examination that you made an attempt to secure screen privileges from the United Theatres, Corporation, is that correct?

A. Yes.

Q. And that you were not able to secure those contracts?

e:

A. That's right.

Q. That you also attempted to secure contracts from the Southern Amusement Company. What was the result of those negotiations?

A. They were unsuccessful.

Q. You never contacted the Malco Theatres, I understood you to say?

A. What was the beginning of that question?

Q. What was the beginning of that question; I said you never undertook to contact the Malco Theatres to secure screen picture production?

A. We did not.

Q. I understood you to say that with regard to Jefferson Amusement Company you had shown a few films on a test basis and never gotten a contract from them?

A. That's right.

Q. Isn't it a fact that subsequent to the test that you made, the Motion Picture Advertising Service Company went in and secured a contract for screen privileges?

A. Yes, by paying some foreign corporation more

than the sum we would be prepared to pay.

Q. They paid the theatres more money than you ever had to pay; that is why they got the contract?

A. That's right.

Q. Did I understand you to say that with regard to Delta Theatres, you had no contracts with that particular chain?

A: I didn't handle that correspondence.

Q. You didn't handle that correspondence?
A. That's right

Q. Who has the screen privileges for screen advertising at the Fox Theatre in Pollack, Louisiana, at this time?

A. I believe the Exhibitors Advertising Company are

the Louisiana distributors who has those privileges.

The Exhibitors Advertising Company has several contracts with Fox Theatres. I couldn't definitely tell your which one of the Fox Theatres those are that are located in Louisiana, such as were handled and owned by a corporation owned by Billy Fox Johnson; I don't know the exact towns.

Q. Those contracts that are now held by your dis-

tributor are exclusive, are they not?

A. Yes.

Q. Prior to your distributor obtaining those contracts, the Motion Picture Advertising Service Company had a contract for screen privileges, did it not?

A. I couldn't answer that.

Q. Don't you know that to be so?

A. No, I don't know it personally to be so.

Q. You heard that. You were-

Mr. COLLINS: I object to that.

Trial Examiner KOLB: Off the record.

(Discussion off the record.)

Trial Examiner KOLB: On the record.

[285] Q. (By Mr. ROSEN:) Who did have the screen rights to those, prior to that?

A. I don't know.

Q. Were they held by one of your competitors or were they not?

Mr. Collins: I object.

al Examiner Kolb: Objection sustained:

The Witness said he didn't know.

Q. (By Mr. ROSEN:) Mr. Weigand, you have no hesitation, do you, in going to theatres or theatre chains where they have contracts with your competitors and negotiating with them to secure screen privileges at the expiration of those contracts, do you?

Mr. COLLINS: I object.

Trial Examiner Kolb: Objection sustained.

Q. (By Mr. ROSEN:) Is your company and your distributor in open competition with the Motion Picture Advertising Service Company in securing screen privileges from theatres in the territory that you testified of?

Mr. COLLINS: I object to that.

Trial Examiner Kolb: What do you mean open competition. Strike the word open.

Mr. Rosen: I mean competition.

Mr. Collins: It is my understanding that the fact

should go in and that it is up to the Commission to determine whether or not that constitutes competition.

Trial Examiner KOLB: I overrule the objection.

The WITNESS: In answer, there are two ways of ob-

taining contracts.

One is a non-exclusive contract and another is an exclusive contract. In the case of an attempt for an exclusive contract, there is competition.

Q. (By Mr. Rosen:) I take it from your answer that your company and your distributor attempt to secure exclusive contracts from those theatres who are willing

to make contracts with you,

- A. Our policy is to make nonexclusive contracts wherever possible, and it has been, from the beginning of our business, we have been forced in several defenses to make some—that is, our distributors have been forced in several defenses to make some exclusive contracts in order to be able to have some theatres in which to exhibit films.
 - Q. You say your policy originally was to make non-exclusive contracts with the theatres?

A. Yes, sir.

Q. Now, you try to have exclusive contracts because

you are forced to do that by your competitors?

A. Not only now. In fact, our present distributor, Exhibitors Advertising Company has found it necessary to make exclusive contracts in order to be able to obtain enough business to stay in business.

[287] Q. Isn't it a fact, within your knowledge and experience, that theatres limit the amount of screen advertising that can be shown on the screen in

any given performance?

A. There is usually a limitation, not only on the part of the theatre but on our own side of the question. We don't wish ourselves to exhibit more than a given number for the reason that it is obnoxious to the audience and represents a lesser value to the advertiser.

Q. On the average, what would you say that limita-

tion was?

A. Vell, in practically all contracts, the limitation

is six or eight advertising units in any given thatre

performance.

Q. Well, when you adopted the previous policy that you spoke of, of obtaining nonexclusive theatre contracts, I take it that there were contracts the theatres made in those cases with your competitors, so that there was more than one screen advertising company screening films at the same time on that theatre screen, is that right?

A. In many instances, that was true.

Q. In those cases, in order to do business, each one of the distributors, like yourself, would go and sell advertising and manufacture film and then try to show it on the theatre screen, is that right?

A. Yes.

Q. Since the theatres limited the number of advertisements that could be shown in any given performance and you gentlemen engaged in the advertising realize that that was a proper limitation, how would you know when you went out to sell an ad that it would be exhibited at a given performance when you didn't know how many competitors sold to the same performance?

Mr. Collins: I object to that. Mr. Examiner, I venture to say that counsel didn't tell us what the question involved.

Trial Examiner Kolb: The objection will be sustained.

Q. (By Mr. ROSEN:) Mr. Weigand, in those cases in which your company had nonexclusive agreements, how were you able to know how many ads to sell for performances for that theatre?

A. Our representative had to contact the theatre to find out how many spaces were open before he could sell.

Q. And that was necessary each time that you were selling advertising, because what was true one minute

might change the next, isn't that true?

A. It wasn't quite as drastic as that. We developed the experience where large use of the space in the theatre was taking place and we also had experience where little use of the advertising space in the theatre was taking place and only in instances where there was

serious competition for advertisers accounts on a given theatre screen, was it necessary for us to check [289] with the theatre manager in order to find out whether he would accept additional advertising on his screen.

Q. So that in case the theatre screen was not filled with the maximum amount of advertising it was willing to display, you found that you could go along selling advertising and getting the advertisements exhibited when you manufactured the film and sent it into the theatre?

A. After we had the contract, even nonexclusive of

the theatre.

Q. I venture the assertion, in the more busy areas, you found on occasion that the theatre's screen was filled with competitors ads and then your orders could not be shown at that performance?

That only happens in very occasional instances. I wouldn't be able to state any specific one at the

moment.

Q. If the theatre was willing to exhibit six to eight ads and you had a nonexclusive arrangement, how many ads would you or your company sell per performance?

Our experience was we couldn't sell more than two or three per performance on any given trip of a representative in that area.

Q. And that left room for four or five for your

combetitors who had similar contracts as you?

A Right.

Well, now, with regard to the present day arrangement where you have exclusive contracts with theatres, how many advertisements are those theatres willing to show?

This present day arrangement, there is nothing modern about exclusive or nonexclusive contracts. Some theatres have exclusive and some nonexclusive.

Those nonexclusive are the ones that no one has ever

offered enough money to make them exclusive.

Q. Well, you mean since you have been in the business, you found that some theatres were contracted on an exclusive arrangement and others on a nonexclusive arrangement?

A. Yes.

Q. That depends to a great extent whether the theatre owners themselves wanted to do business on one basis or another?

Mr. COLLINS: I object,

Trial Examiner KOLB: Objection sustained.

Q. (By Mr. ROSEN:) You said that the question of whether or not the contract with the theatre was exclusive or nonexclusive depends upon how much money was paid in the theatre?

A. I don't believe I said that.

Trial Examiner KOLB: Off the record.

(Discussion off the record.)

Trial Examiner KOLB: On the record.

Q. (By Mr. ROSEN:) Has the Motion Picture Advertising Service Company ever refused to exhibit films for advertisers with whom you have contracts on screens that are available to the Motion Picture Advertising Service Company?

A. Did you say ever?

Q. Yes.

A. That would involve my giving a specific instance of a refusal. I wouldn't be able to give a specific instance of a refusal.

Q. What is their general policy with regard to accepting advertising from your company to be exhibited on screens under the contract?

A. What was their policy?

Q. As manifested in their dealing with you, Mr. Weigand.

Mr. Collins: Mr. Examiner, I think I will object. I think that is going out of the field of the direct.

Trial Examiner KOLB: The objection will be sustained.

Q. (By Mr. ROSEN:) Mr. Weigand, have you ever requested the Motion Picture Advertising Service Company to exhibit film advertising of your customers on screens under the contract to them?

.A. Yes.

Q. Have they generally accepted the business?

A. Yes.

Q. Have they ever refused to accept the business?

Mr. Collins: Mr. Examiner, I submit that particular question was asked a minute ago and the witness answered that specific question.

Trial Examiner KOLB: The objection will be

overruled.

Q. (By Mr. Rosen:) You may answer it.

A. I said that I would have to indicate a specific instance when we were refused. I couldn't think of a specific instance in which we were refused.

[295] RENE P. KARRIGAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Collins:) Give your full name and address.

A. Rene P. Karrigan, 525 Poydras Street, New Or-

leans, Louisiana.

Q. Mr. Karrigan, in what business are you engaged?
A. In the business of production and distribution of motion pictures.

Q. Under what name are you operating?"

A. Commerce Picture Sales Corporation.

Q. And how long have you been engaged in that business?

A. Commerce Picture Sales Corporation has engaged

in this business since 1941.

Q. And how long have you been engaged in it personally?

A. Since 1932.

Q. And were you working for yourself or were you employed by someone prior to 1941?

A. Prior to 1941, I was employed by the [296] Motion Picture Advertising Service Corporation of New Orleans.

Q. And how long did you work for Motion Picture Advertising Service Corporation?

A. 1932 to 1941.

Q. And then you-

A. Formed the Commerce Picture Sales Corporation.

Q. And you have been operating that business ever since?

A. Ever since.

Q. Now, is that a corporation?

A. Yes, sir.

Q. That's the one in which Mr. Weigand is connected, isn't it?

A. Yes, sir.

Q. Mr. Weigand is the man who testified on yester-day in this case?

A. That's right.

[307]

CROSS-EXAMINATION

Q. (By Mr. ROSEN:) Mr. Karrigan, you stated that when you first engaged in this business as an employee of Motion Dicture Advertising Service Company in 1932, you worked for them until 1941 and then you went into business for yourself, is that right?

A. Right.

Q. When you first went into this line of endeavor as an employee of M. P. A., did theatres at that time give exclusive contracts to the distributors?

A. Yes.

Q. Some gave exclusive contracts and some gave non-exclusive contracts?

A. Correct.

Q. To several distributors?

To restate my question for the record, some:
[308] theatres gave exclusive contracts to one distributor and other theatres gave nonexclusive contracts to several distributors?

A. That's correct.

[313] Q. When you first contacted the Jefferson Amusement Company, were they running any screen advertising on their screens?

A. I don't believe so.

Q. You made a test run in one theatre, free of charge, in order to try and negotiate a contract with them for screen advertising rights?

A. Right.

Q. After that test run, Motion Picture Advertising Service Company made a proposition to them, as a result of which Jefferson Amusement Company entered into a contract with Motion Picture Advertising Service Company, isn't that correct?

A. That's right.

[314] Q. With regard to the Roxy Theatre, referred to in Commission's Exhibit 20—I think you have seen that?

A. Yes, sir.

Is it not a fact that the Roxy Theatre in Lafayette, Louisiana, at about the time of this letter was purchased by the Southern Amusement Company and became one of the theatres in that chain?

A. That's correct.

Q. Is it not a fact that prior to the date of this letter, January 21, 1944, the Southern Amusement Company had a contract with Motion Picture Advertising Service Company covering all of its theatres?

A. I don't know that to be a fact but I assume that

is the case.

Q. Well, being in the industry, didn't you know that that was the situation?

A. Well, I know that they were running—
[315] that the Motion Picture Advertising Service
Company was running service on their screen
but what kind of contract was in existence, I don't know

Q. That was running on Southern Amusement

Screens?

A. That's right.

Q. And when the Roxy Theatre became a part of that chain, then, they wrote you this letter?

A. That's right.

Q. Mr. Karrigan, what arrangement did you have with the Madison Theatre in Memphis prior to the writing of this letter of December 13, 1943?

A. I had a nonexclusive arrangement to run ads at

a rate per week for each ad run.

Q. Have you ever, since the receipt of this letter, made any attempt to secure a contract with the owner of this theatre?

A. No, sir, because I discontinued my representative there and had no occasion to solicit the theatre.

Q. You don't do business in that territory?

A. Not at the present time.

Q. You have testified in answer to Mr. Collins' question that under the present arrangement between your company and M. P. A., you make less profit by taking agency commissions than if you screened films directly on the theatre screens under arrangements directly made

with the theatre Did I understand you right?

[316] A. That's correct.

Q. But under such arrangements there are no obligations on the part of your company to pay any amount of money to the theatre, is there?

A. That's correct.

Q. Some of these theatre screen agreements made with some theatres require a minimum guarantee from the distributor, do they not?

A. I think that is, in some cases, used as a means

of making a deal with the theatre or theatre chain.

Q. In the competition among the distributors for theatre screen agreements, minimum guarantees are resorted to on occasions in order to induce the theatre to make an exclusive contract, is that right.

A. That's correct.

Q. In such cases the distributor who has the exclusive privilege must pay the guarantee whether the films are screened or not?

A. That's correct.

Mr. Collins: I want to object to this.
Trial Examiner Kolb: The objection is sus-

Q. (By Mr. ROSEN:) The arrangement that your company handles with M. P. A., they allow you the agency commission, I understand you to say. What amount is that?

A. Fifteen per cent.

Q. Is that the standard or usual rate allowed throughout the country to advertising agencies?

A. Correct.

That is the same rate that you allow them when they book through you?

That's right.

Q. Has there been any change that has taken place from 1932 to the present time with regard to securing of theatre screen agreements, with regard particularly to the question of exclusive clauses in the contract?

A. Well, that I don't know. I could only guide myself in accordance with the way we make contracts with the theatres that we do business with. But what our competitors do is beyond our knowledge; whether there has been any change in the way the contracts are made we wouldn't be able to state.

Q. Well, let me ask you first when you first worked for M. P. A., that company and competitors of that company obtained exclusive contracts from theatres sometimes and nonexclusive sometimes, in 1932, didn't they?

That's right.

Q. And that condition has not changed from 1932 to the present time, is that right?

You mean the condition of making contracts?

Q. In some cases, theatres make exclusive and others nonexclusive.

That condition still exists.

When you go in yourself to negotiate a theatre screen agreement, do you attempt to make it on an exclusive basis?

A. No. sir.

Q. Do you have any exclusive contracts?

A. Not in the name of Commerce Picture Sales Corporation.

In the names of your distributors? Q.

They have.

Q. They had A. That's right. They have exclusive?

Q. Don't you direct them-their policies in connection with that?

A. No, sir, they handle their own theatre connections.

Q. So that while your distributors at the present time do have some exclusive contracts, your practice in getting screen privileges for your own company is to take nonexclusive contracts?

A. That's right.

Q. Do you have any exclusive contracts?

A. No, sir, not in the name of Commerce [319] Picture Sales Corporation.

- Q. Well, I was not trying to draw any fine distinction between your company and your distributors. What is the significance to the last answer, not in the name of-
- A. Well, the question of exclusive contracts during the course of this hearing has been a long the lines of how many exclusive contracts do we hold, and our answer has been none; that they are held by our distributors and I want to keep that point clear.
- Q. You testified with regard to the Billy Fox Theatres. I understand one is the Fox Theatre in Bunkie and one was the theatre in Marksville.

A. Yes, sir.

Who has the screen agreements with those theatres at the present time?

The Exhibitors Advertising Company.

A. The Exhibitors A. Q. That is your distributor?

A. That's right.

Q. Is that contract exclusive or nonexclusive?

A. At the present time it seems to be a very nonexclusive contract because we have just recently checked and found competition.

Q. What does the contract read? A. The contract reads exclusive.

- When your distributor got the contract, isn't it a fact that the owners had already entered into a contract with, Motion Picture Advertising Sales; they breached the contract and then turned it over to your distributor?
- A. That I wouldn't know, I did not make the contract myself.

You didn't.

A. No.

Q. Do you know whether that contract for the Fox Theatre was obtained in competition with the Motion Picture Advertising Service Company?

A. That I don't know because I didn't handle the contract.

Q. You stated that is part of your duties. You obtained theatre screen agreements with theatres in territories not covered by distributors for your company?

A. That's correct.

Q. Did you do that in competition with the Motion

Picture Advertising Service Company?

A. When we make a contract we don't know who we are in competition with. We are merely working on our own and we are not worried about competitors.

Q. Who are your competitors for screen rights in

this territory?

A. Well, the Motion Picture Advertising Com-[324] pany, the Alexander Film Company and every now and then someone from out of town that might come in from some other area with special deals.

[326] Q. So there is no uniform rate that the competitors agree to pay per ad. 'Each distributor makes his own rate and offers that to the theatre?

A. Correct.

Q. And in some cases the theatre accepts all the business and in some cases the theatre picks out one of the distributors and gives him the business alone?

A. Well-

Q. Don't you know the answer? Mr. COLLINS: Let him answer it.

Trial Examiner KOLB: Answer the question.

The WITNESS: The one case that I know of, of the exclusive case, is where he picks out one distributor.

Q. (By Mr. ROSEN:) That is what I have in my mind in the latter case where he picks one out and gives him an exclusive contract.

A. Well, he doesn't exactly pick him, perhaps the distributor who makes the exclusive contract may have a better deal. It may not be in money, it may be in better service.

Q. So, in other words, he likes the character of film shown and that may be one of the contributing factors to move the theatre?

A. That's right, as a matter of fact, our contracts are made on that as a basis. They like the character of our service a lot better.

[328] Q. Mr. Karrigan, I show you a letter. Mr. Karrigan, does the Exhibitors Advertising Service have theatre screen agreements with the Don Theatre of Alexandria?

A. Yes, sir.

Q. The Davis of Bossier City?

A. Yes, sir.

Q. And the Lake Theatre of Shreveport, Louisiana?

A. Yes, sir.

Q. Are those contracts exclusive contracts or non-exclusive?

A. Exclusive, with the Exhibitors Advertising Company.

Q. That is your distributor?

A. That's right.

[330] Q. At the present time, you have, as you testified, an arrangement with M. P. A. under which you book some films in theatres on screen agreements with them and they book some with theatres on screen agreements with you or your distributors?

A. That's right.

[331] Q. Isn't it true in your experience in booking the films through M. P. A., that they have generally accepted the business in screening and advertising?

A. They have accepted the majority of the business that we have offered.

[332] REDIRECT EXAMINATION

Q. (By Mr. Collins:) Mr. Karrigan, counsel asked you if you were not able to have your ads screened in more theatres by having access to the theatres controlled by M. P. A.

Does the existence of exclusive contracts between M. P. A. and the different theatres give you and your

distributors a wider distribution of your advertising films?

A. To a certain extent.

Q. It does?

A. To a certain extent.

[340] NOBLE C. CAMPBELL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Collins:) Mr. Campbell, would you state.

for us the nature of your business?

A. I am distributor of Parrot Films, Des Moines, Iowa. I sell advertising, screen advertising to the business firms, collect for it, order it made and shipped direct to the customer.

Q. Do you or do you not make any arrangements

with the theatres for displaying?

A. In each case I make a written contract to run a certain length of time, whatever time that may be.

Q. Do you make that arrangement before or after

you have contacted the advertiser?

A. I make that before. The first thing I do when I start working a town I call on the theatre and make a contract. Otherwise I don't work the town.

Q. Then after you have sold the advertising to the advertiser, from where do you obtain your films?

A. I send the orders into Parrot Films, Des Moines, Iowa and they ship direct to the customer.

Q. Now, what territory do you cover, Mr. Campbell?

A. Well, of recent years it is Virginia, West Virginia, North Carolina, South Carolina, Kentucky and three spots in Indiana.

Q. How long have you been engaged in this business?

A. Well, I have been in this business approximately 18 to 29 years. I have been with Parrot Films 12 to 15 years.

Q. Mr. Campbell, did you ever transact any business

with any theatres in Charlotte, North Carolina?

A. At where?

1

Q. Charlotte, North Carolina.

A. Not in Charlotte, North Carolina, no, sir. I have contacted the home offices of two chains in Charlotte, North Carolina.

Q. What were the names of those two-chains?

A. The Kinsey Amusement Company. That is not exactly the right name. I'll have to look it up again, and the Everett Amusement Company. That was the Wilkie Kensey Amusement Company.

Q. Where are their theatres located?

[342] - A. They are scattered all over North and South Carolina and Georgia.

Q. Did you say that you did or did not do business with the Wilkie Kinsey Amusement Company?

A. I did not. I failed to make a contract.

Q. When did you contact them?

A. In recent years I would say I contacted them three or four times over a period of six or eight years.

Q. And were you advised of the reason that you could not do business with them?

A. Yes, you mean the Kinsey people?

Q. Yes.

A. They had an exclusive contract with Alexander.

Q. Anyone else?

Mr. Rosen: I object to that on the grounds it is leading and suggestive. The witness has answered the question.

Trial Examiner Kolb: The witness may answer the question. Was anyone else mentioned besides the Alexander Film Company in your discussions with the Kinsey chain.

The WITNESS: No, sir.

Q. (By Mr. Collins:) Did you ever do any business

with any theatres in Nashville, Tennessee?

A. No, sir, I never have. I have tried to contact them. I never did meet him. The Tennessee and Western Kentucky area is pretty much tied up and [343] some parts of Georgia is pretty much tied up with the Sudecum Chain in Nashville and I have never called on their home office, but their managers have told me that they had exclusive contracts

with either Alexander or M. P. A.

Q. Now, do you know how many of the theatres you contacted in that chain?

Not too many. I made a circuit in Western Ken-

tucky.

Q. You did what?

I made a circuit in Western Kentucky two or three years ago and didn't make a single contract because they were all Sudecum Theaters, you know.

Q. Sudecum Theaters?
A. That is right, and they couldn't do any business.

Mr. COLLINS: I think that is all.

CROSS-EXAMINATION

(By Mr. Rosen: Mr. Campbell, when you stated in direct examination the states and places where you did your business. I understood you to say Kentucky Virginia, West Virginia, North Carolina, South Carolina, and three towns in Indiana.

That is correct.

Q. Did I get that correct?

A. You understand, I can go anywhere east. I can go in any state east."

Q. But that is where you have been trying

m

[344] to do business?

A. Yes, that is where my business is. It has developed down to that point. In traveling all over the country I established finally my personal business in the territories that I mentioned there.

Q. The headquarters of the Sudecum Theaters, you

said, was in Nashville, Tennessee?

That is right.

Q. And your testimony with regard to that chain given a moment ago was based on what you say the manager of one of their theatres gave you?

A. No. several of them.

Q. Had you ever been to see one of the heads of that Sudecum Chain?

A: No.

Q. You made no attempt to secure the screen privileges for that circuit?

A. Yes, I did.

Q. Whom did you see?

A. Various managers in the towns.

Q. The individual theater operated by that manager?

A. No, some Sudecum Chain operates and their associates operate perhaps 200 theaters or maybe 300 theaters. In fact, in Tennessee, see, they have so far as I know every good town tied up by Sudecum Theaters.

Q. In Tennessee?

[345] A. In Tennessee and Western Kentucky and a few towns in North Carolina, not many, and a few towns in Virginia. I have in mind the town right, near Bristol where the Eastman Films are made where they have a big plant there. No, I am wrong. That is wrong. That is another outfit.

Q. I didn't mean to interrupt you. I want to have

you complete your answer.

A. I am finished.

Q. I understand that you say you did speak to several of the managers of the theatres of the Sudecum circuit?

A. That is right.

Q. How many managers did you speak to?

A. Oh, I would say— Q. Just approximately?

A. Well, I'd say easy 10 or 12. Q. Located in different towns?

A. Different towns.

Q. You mean you spoke to these managers with respect to getting a screen privilege for that particular theater operated by that particular manager?

A. That is right.

Q. But no attempt was made by you to cover the whole chain of the Sudecum circuit by a screening agreement covering all cf their theaters?

A. No.

[346] Q. Because you were not prepared with your limited organization to sell advertising in all of these towns, were you?

A. Yes. Q. Sir?

A. Yes, I was prepared to sell them.

Q. In Tennessee?

A. Yes.

Q. What organization, if any, did you have to sell advertising in Tennessee?

A. I didn't have any organization but I have the rights to go into Tennessee and operate the same as I

do in North Carolina, or Tennessee, or Virginia.

Q. You mean that your agreement with the Parrot Film Company permits you to go in there if you want to?

A. My agreement with Parrot Film Company permits me to go everywhere east of the Mississippi River

with the exception of Ohio and Michigan.

Q. My question was this, that once you have secured the right from the theater of screening films, then you sale the next step was you would go in and sell the advertising?

A. That is right.

Q.— Well, had they given you all the theaters in Tennessee, it would have then become necessary for you to go into those towns and sell advertising in Tennessee, wouldn't it?

[347] A. That is right.

Q. Did you have any organization prepared,

to handle that work?

A. I didn't have any but if I could have booked Tennessee I could have easily.

Q. Built up one?

A. Yes.

Q. You would have then organized some sales force to go into those towns?

A. That is right.

Q. But at the time you tried to get the theaters you had not done business in Tennessee, had you?

A. Only with one or two exceptions.

Que Well, in the cases of the ten—you said approximately ten theater managers of the Sudecum circuit—did you make any firm offer as to what you were willing to pay for the screen privileges?

A. I didn't get that far.

Q. You didn't get that far?

A. In a few instances I may have but in general I didn't.

- Q. In the few instances you did make offers, what were they?4
 - A. I don't know.

Q. You remember?

A. / No, I don't.

Q. Give us one case of what you offered?

A. I don't know.

Q. Well, was it your habit in those cases to offer so much for advertisement that they would screen or to offer them so much for a guarantee for the theater for a year?

No. I offered them so much for the individual ad.

Q. So that your general way of securing screen privileges from a theater was to offer so much per ad that they would display on their screen?

That is right.

That price would vary according to the size of the theater in the town?

A. That is right.

And how many ads were you permitted generally. to display where the theater did make an agreement with you? . What was customary?

A. Usually the limit is ten.

Q. In the most cases isn't it much under that?

· A. No, on the 12 months it will everage around 7.

Q. Per performance?
A. What?

Q. Seven ads per performance?

A. That is right. It will average around 7 ads for the year on my business. That is not the general average of all salesman.

Q. In the case when you made an offer of so much per ad to these various managers, was there any guarantee as to the number of ads you would put on the screen?

A. Except in many cases they have a minimum:

Q. What is the minimum?

A. A minimum of maybe, say, \$20.00. For instance, sometimes if I would only sell one or two or maybe I'd have to sell they would require me to pay \$20.00. In other words, they would play safe. On the other hand, they would charge in most cases per ad and without a minimum, but in some instances they require a minimum.

Q. But in most of the cases where you made contracts, you offered so much per ad per performance?

A. That is right.

Q. And then if you sold, displayed, one ad, they would get the price that you agreed to pay for that advertisement and if you sold four they got four times that unit price and that depended upon the number of ads you were able to sell?

. That is right.

Q. I understood you to state that your method of doing business was to first contact the theater and get the right from the theater to exhibit the film and thereafter, if you got it, to go out and sell the ad?

A. That is right.

Q. Now, I want to ask you something about that because I am ignorant on this subject.

A. O. K.

[350] Q. When you would go into any theater and then get the right to exhibit and film that, how one would that right exist, for one day, one week, or one year?

A. That would be up to the theater.

Q. Generally, give me a general case?

A. Generally four weeks is my system.

Q. Four weeks?

A. Yes.

Q. So that you would go into the theater and get a right from them to exhibit some films for four weeks?

A. That is right. Then I would call on that theater three or four times a year. In other words, in place of running continuous I would run a month and off two or three months.

Q. Well, suppose when you went into the theater to obtain that right, suppose the theater agreed to what you wanted. You at that stage had no advertisement sold at all, had you?

A. That is right.

Q. Therefore, if the theater was willing to exhibit, as you say, ten ads in some cases?

A. That is right.

Q You had not sold any previously?

A. That is right.

Q. Then the number that they would put on the screen would depend upon your ability later to sell the ads?

[351] A. That is right.

Q. And if you sold ten they put ten on?

A. That is right.

Q. And if you sold two they put two on?

A. That is right.

Q. And if you sold none they put none on?

A. That is right.

Q. Therefore, unless you had made some guarantee of a minimum to the theaters, they would never know after making the contract with you what consideration they would get from you for that contract, would they?

A. Until I told them the total.

Q. You are talking about the total?

A. Until I told them the total.

Q. Until later on you ship the films in?

A. Except the ones who required a minimum.

Q. And in those cases there was a minimum but in most cases you did not guarantee?

A. In most cases they don't ask for a minimum.

Q. So the majority of your cases there was no guarantee whatever. It was only the exceptional case?

A. If you will allow me to say this, I don't know whether I should or not, but I have been on the job so long and I am so thoroughly established in my particular personal business that they know me and naturally they

know that I will sell up to ten. Sometimes I [352] don't get but eight; sometimes—once in awhile—

I might not get but two or three, and in some instances maybe I won't get any. That has happened, of course.

Q. That has happened sometimes?

A. Outside of that fact, I don't know whether that would enter into it or not.

Q. Well; now, in the case where you would get this right, you say that is for four weeks generally?

A. That is right.

Q. With regard to those theaters that you have in mind, would they at the same time have contracts with other distributors similar to yourself to exhibit ads for them if they sold them?

A. You say, would they?

Q. Yes.

A. Yes, if they wanted to as far as I am concerned.

Q. I mean go back in your mind in those cases in which you did get those contracts, were you the only one they dealt with or did they have contracts with several distributors?

A. Are you talking about the Sudecum?

Q. I am speaking about the ones you succeeded in getting, the 40 or 50 theaters right now that you service.

A. In most cases they have contracts with other services, mostly Alexander. The others don't enter into it

enough to waste the time to take up.

[353] Q. Most of your competition, you say, comes from Alexander?

A. That is right. It is the only concern in the United States that has a complete sales organization of this kind.

Q. Well, in the cases right now that you have under contract in which they also have existing contracts with Alexander, suppose Alexander sales force goes in and sells advertising and fills up the screen, what happens to the ads when you send yours in?

A. The ads are run.

Q. Sir?

A. The ads are run according to contract.

Q. If they limit the screen to ten and they have got contracts with you?

A. I beg your pardon.

Q. Let's go back a little bit.

A. They limit me to ten in most cases.

Q. You don't mean by that that they will in any one performance exhibit more than ten advertisements, do you?

A. I mean that they exhibit the contracts, the advertising that I sell and if there is a limit of ten, which

usually there is, why, I stop at ten. I don't sell over

ten. I have in a few instances sold more.

Q. What I was asking you was this. You are familiar with the operations of the theaters that you service, aren't you?

A. That is right.

[354] Q. What is the greatest number of advertisements they will exhibit in any one performance?

A. I don't know.

Q. Have you ever seen them run over ten? Isn't it generally less than ten?

A. Are you talking about my service or all services?

Q. All advertisements on the screen in any one performance.

A. Lots of them run more than ten. I sold nine this week in Paintsville, Kentucky and M. P. A. and Alexander, I think, have about six on the screen continuously.

Q. You go to the theaters often and see the pictures? What is the customary number of advertisements that are exhibited on the screen, those that permit advertising?

A. I don't think there is any customary number. I think that depends on the theater manager.

Q. What is the most you ever saw in your whole life at one time?

A. I wouldn't answer that question. I think I have seen as many as sixteen.

Q. That is the most you ever saw?

A. I think so.

Q. What I am asking you is this. In case you have a contract that permits you to sell ten and at the same time the theater has a contract with Alexander, you say?

As That is right.

[355] Q. Suppose by the time you get around to selling the ads Alexander has sold ads and filled up the screen. What happens to the ten that you have sold?

A. They are run.

Mr. Collins: I am going to object to that.

Trial Examiner KOLB: The witness has answered this about three times.

Mr. ROSEN: I must say then I don't understand his answer.

The WITNESS: There is no reason for misunderstanding on that. When I go into a town I make a contract that is good.

Q. (By Mr. ROSEN:) What do you mean by "good"?

A. I mean it is binding and the theater is responsible

and they run it according to contract.

Q. That is just what I meant. When you make a contract with a theater for four weeks for up to ten ads, you have a binding commitment on the theater that if you sell those ten ads or up to ten they will exhibit them for you?

A. Yes.

Q. And they carry out the contract?

A. Yes.

Q. Irrespective of what deals they have with other people?

A. Yes.

[356] Q. Then, according to your testimony, Mr. Campbell, you make these arrangements for four week intervals?

A. That is right.

Q. And then when you get through with that four week interval you have to go back to that theater to get another commitment for the next four weeks?

A. That is right.

Q. So that with regard to those theaters that do business with you, you have to repeat your contract 13 times a year?

A. No.

Q. I mean 12 times a year?

A. No, about four times a year.

Q. Well, I say 4 weeks into 52 weeks is 13, isn't it?

A. No, I run a contract for four weeks starting on August 1, we'll say, that runs up four weeks during the month of August, which is practically the last day of August, and then I am out September, October and usually November.

Q. Why are you out those three months?

A. Because that is my way of doing busi ss. In

place of running continuously, my theory is that continuous advertising becomes monotonous to the public and we are on four weeks and we are out for three months. We give them a rest and then we come on with something entirely different.

Q. Let me ask you a question about that. Suppose you went into a theater that was willing to write any

kind of an arrangement you wanted. I understand that your policy is that you would run for one month and then be off for three months?

A: That is right,

Q. That is your way of doing business?

A. That is right.

Q. So that according to your method the theater would get consideration for the month it ran its ad with you and the next three months they wouldn't get any ads?

Mr. Collins: I submit that is argumentative and it is simple arithmetic.

Tral Examiner Kolb: The witness has answered.

A. That is right.

Mr. ROSEN: That is all.

[366] Mr. ROSEN: It is stipulated by counsel for the Federal Trade Commission and counsel for the respondent—that a copy of the testimony taken here in Colorado Springs in the three cases, Docket No. 5495, 5496 and 5497 shall be incorporated in the record of 5498. Is that all right, Mr. Collins?

Mr. Collins: Yes, it is agreeable to me.

(The testimony taken in Docket 5495, referred to in the above stipulation, is a follows:)

Mr. Hopgson: I will call Mr. Reid H. Ray.

REID H. RAY was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hodgson:) Your name?

A. Reid H. Ray.

Q. Your occupation.

A. President of Reid H. Ray Film Industries.

Q. Reid H. Ray Film Industries, Inc.?

A. Yes, sir.

Q. That is the same corporation as is named in these proceedings as Ray-Bell Films, Inc.?

A. It is.

Q. The corporation is the same corporation [367] but the name has been changed?

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[374] Q. Is your business competitive? A. Film advertising business?

Q. Yes.

A. It is very competitive.

Q. How did you grow from scratch in 1936 to 1450

theatres in 1947.

A. Well, it took a lot of hard work, a lot of sales effort, to contact theatres and obtain screening agreements from companies that had been in the business for many years, and our sales manager and his sales force, by a lot of sheer effort and hard work and consistent plugging, built one by one those theatre contracts

[375] up until they gave us a nucleus for film adver-

tising operations.

Q. You heard the testimony of Mr. McInaney that the acquisition of advertising contracts is also highly competitive. Would your answer to a similar question be the same as Mr. McInaney's?

A. Yes, it would. The obtaining of the advertiser's agreement and contract to run advertising films in local

theatres is a most competitive business.

[378] Q. Now, Mr. Ray, you heard the testimony of Mr. McInaney yesterday with respect to the reasons which induced the taking of exclusive theatre contracts?

A. Yes, I heard that testimony.

Q. Would your testimony be to the same effect?

A. I would give the same reasons, plus possibly one additional.

). What would the additional reason be?

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A. We believe that the exclusive contract with the theatre enables that theatre to handle its film advertising accounting and records in a far more simple manner by doing business with one company, which in many instances is a considerable amount of bookkeeping and accounting and keeping track of films that are shipped to the theatre and proof of screening to the film advertising company.

Q. Now as between a theatre under the so-called exclusive contract and one under the so-called non-exclusive contract, which one will have the most idle

screen space?

Mr. COLLINS: Mr. Examiner—

Q. (By Mr. Hodgson:) (Continuing) If you know.

Mr. Collins: I withdraw that.

Trial Examiner Kolb: Objection is withdrawn. Proceed.

- A. The theatre with the non-exclusive contract will have more open space units available than the exclusive theatre.
- [379] Q. (By Mr. Hodgson:) Now, do you have any exclusive contracts where the exclusive feature was put in expressly at the request of the theatre owner?

A. Yes, we have.

Q. Would you name some of them?

- A. The Minnesota Amusement Company and the Home Theatres.
- Q. Now, how many theatres are in the Minnesota Amusement Company circuit?

A. At the present time there are 64 theatres oper-

ating and running film advertising.

Q. And your contract with the Minnesota Amusement Company runs for how long?

A. One year.

Q. And explain just how the subject of the exclusive

feature came up in connection with that contract?

A. Well, in my negotiating with the Minnesota Amusement Company for the contract, it was specifically asked by the management of the Minnesota Amusement Company that we be their exclusive.

Mr. Collins: Mr. Examiner, I submit that any request of anyone is no defense in this proceeding, and it is not material, and even solicitations by others for this respondent to enter into contracts containing the exclusive clause is no defense. I object to the testimony.

Mr. Hodgson: I submit it is perfectly proper,

[380] Your Honor.

Trial Examiner Kolb: Do you have anything

to say on that?

Mr. Hodgson: Yes. It strikes me that it is perfectly proper. Here is a theatre owner who has 64 theatres, and he comes to the Reid H. Ray Film Industries and

says, "We want an exclusive with you."

Trial Examiner Kolb: I believe it is proper to show the circumstances under which the exclusive contract in this particular instance was made. The extent to which it is a defense is not involved at the present time. It is a question of whether they have a right to the testimony at all or not.

Mr. Collins: Mr. Examiner, my contention is that it does not matter and it is no defense on my part if I have killed a man, to say that Tom Jones asked me to kill him or that Bill Smith asked me to kill him. The same situation exists here. It is no defense to these parties because someone asked them to enter into the contract.

Trial Examiner Kolb: The objection will be over-

ruled.

Mr. Hodgson: You may answer. What is the question now, please?

Trial Examiner KOLB: Read the question.

The WITNESS: I think I had finished with the Minnesota Amusement Company answer. I can go on, I don't see any reason to.

[381] Q. (By Mr. Hodgson:) You also mentioned

· the Home Theatre?

A. Yes, I mentioned the Home of Brainerd, Minnesota.

Q. How many theatres in that chain?

A. Ten.

Q. Do you have an exclusive with that chain?

A. Yes, we have.

Q. It is exclusive, did you say?

A. It is exclusive.

Q. Why, was the exclusive feature put in that contract

A. The details of that transaction were not handled by me personally, but our Mr. Ringold handled that and I think he can give you the facts direct.

Q. Do you know of any other theatre owner or chain

owner that requested an exclusive?

A. Yes.

Mr. Collins: Mr. Examiner, I would like for the record to show—I don't want to keep interrupting—if the Trial Examiner's ruling is that all his testimony can go in, I would like the record to show that I object to all the testimony along that line.

Trial Examiner Kolb: Let the record show that the objection has been made to all testimony with reference to the reasons why an exclusive contract is entered into.

Is that your position?

Mr. Collins: Yes, and the testimony with reference to the solicitation by any party for this respondent to enter into any exclusive contracts.

Trial Examiner Kolb: Proceed.

A. Yes, the Volk Brothers' Theatres in Minneapolis.

Q. (By Mr. Hodgson:) How many theatres are in that string?

A. Four.

Q. Tell the details of that transaction.

A. Well, we had had an exclusive contract with those four theatres for about six years, and I had always negotiated that contract personally, and at the last renewal period. I was called into the theatre manager's office and they said that they were going to renew a theatre screen advertising agreement and that they were going to do business with one company and asked that we make our best proposition to them in competition with other companies that were bidding along with us.

Mr. Hodgson: You may inquire, Mr. Collins.

as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Hodgson:) What is your full name?

A. William H. Ringold.

Q. What is your occupation?

A. I am vice-president of the Reid H. Ray Film Industries, Inc.

Q. Is that the corporation which is designated in

these proceedings as Ray-Bell Films, Inc.?

A. Yes, sir.

Q. How long have you been with the respon-[390] dent, this corporate respondent?

A. Since May, 1938.

Q. What are your particular duties in connection with your employment?

A. I am in charge of the accounting and also assist

Mr. Ray in administrative duties.

Q. Are you familiar in all particulars with the film ad business?

A. Yes, sir.

Q. Did you hear Mr. Ray's testimony this morning in its entirety?

A. Yes, sir.

Q. Did you hear him refer to the Home Theatre circuit of Brainerd, Minnesota?

A. Yes, sir.

Q. Do you know about the contract between your company and the Home Theatre circuit which is now in force and effect?

A. Yes.

Q. That, I believe, is a contract carrying the exclusive clause with respect to local advertising?

A. Yes, sir.

Q. Did you have anything to do with negotiating that contract?

A. Yes.

Q. Before whom did you appear in connec-391] tion therewith?

A. Before the Board of Directors of the Home Theatre Company.

Q. What transpired then?

Mr. Collins: Mr. Examiner, I don't know whether the record shows now with reference to this particular witness that I object to that line of testimony.

Trial Examiner Kolb: The objection will be overruled.

·Q. · (By Mr. Hodgson:) Will you tell what happened

at the meeting of the Board of Directors?

A. Well, we were notified by our salesman who works the territory in Northern Minnesota where these theatres are located, that the theatres were complaining because the screens were overcrowded-

Mr. COLLINS: I want to object to that.

Trial Examiner KOLB: The objection will be sustained.

Q. (By Mr. Hodgson:) Just tell what happened before the Board of Directors at which you were present.

A. Well, they told us that they were not satisfied with the way the screen advertising was being handled, it was being handled by three different companies, and that the screens were overcrowded and that they would like to make arrangements with one company to handle the screen advertising in their theatres and that they

would like to limit the number of ads that could [392] be shown on the screens, and that they would like to have us give them-make them an offer of the amount that we would pay them for the use of

their screens for one year.

Q. Did you make them an offer?

A. Yes, sir.

Q. What was the result of your offer?

It was accepted.

Now, you state that one of the things they said 3. to you was that under a non-exclusive arrangement their screen was overcrowded?

A. Yes, sir. Q. You heard Mr. Ray's testimony in response to Mr. Collins, that the screens are more likely to be undercrowded than overcrowded in connection with non-exclusive theatre contracts?

Yes.

Q. What is your experience in connection with that situation?

A. Well, that's true in some cases, not in all cases.

Q. Just what do you mean by that?

A. Well, in some cases where there are non-exclusive situations, the screens are liable to become overcrowded because the film advertising salesman working the town does not know just how many ads there are on the screen, and therefore he goes and sells another ad and the screen becomes overcrowded and the theatre man becomes dissatisfied.

[393] Mr. Hodgson: That is all.

J. Don ALEXANDER was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

- Q. (By Mr. Burgess:) Will you state your full name?
- A. J. Don Alexander.
 - Q. Where do you reside?

A. In Colorado Springs.

- Q. In what business are you engaged, Mr. Alexander?
 - A. Motion picture advertising.
- [394] Q. How long have you been engaged in the motion picture advertising business?

A. Thirty years on the first of next year.

- Q. With what film advertising company are you associated?
 - A. Alexander Film Company.
- Q. In what capacity are you connected with that

A. President and general manager.

Q. Mr. Alexander, will you just give us briefly the

history of the Alexander Film Company?

A. It started in Spokane, Washington, January 1st, 1919, in a very small way, experimentally, at a time when my brother, D. M. Alexander, and I, were engaged in the electrical supply and contracting business, and I was able to obtain a few short length advertising films and to produce some more locally. And I got contracts

with four theatres in Spokane to run them and started to sell the local merchants an advertising service.

Later on I hired a salesman and then gradually added additional salesmen who radiated from Spokane and gradually spread around through the North Pacific country. We obtained contracts with additional theatres, made more films, set up a small library film service, and continued on from there for about three years, three or four years, then moved to Denver, enlarging the business gradually.

Later on, about 20 years ago, we moved to Colorado.

Springs and built a larger plant, and that brings
[395] us to date.

- dence on behalf of the Commission copies of your forms of contracts that are used with the theatres, and those forms of contracts include a clause which in substance provides that during the term of contract the theatre will not show any films for any other advertiser. How long has that form of provision been in your contracts?
- A. The present contract form is essentially the same form, with certain variations, that was established when we started in 30 years ago. The exclusive provision has been in there all that time, according to my best recollection: I am pretty sure we started out with that, although there have been cases where that particular so-called exclusive clause has been scratched out as it is at present, but it has been our practice to try to get exclusive contracts with theatres all the while.
- Q. So that the exclusive contracts with the theatres have been a custom of your business ever since you first started in 1919?
 - A. Yes, sir.
- Q. Now in the production of your library playlets, is it economically feasible to produce one of those playlets unless you know that you are going to have outlets for the showing of them?

A. Obviously not, Mr. Burgess. It would not be eco-

nomically possible to establish or maintain a library unless you had a great number of customers who were using that library over and over again. The

[418] essence of that thought comes from the fact that the average cost of the playlet is high, and you cannot afford—or an individual advertiser, such as ours average in the smaller towns, could not afford to have a special production made for him. The manufacturer of a vacuum cleaner or a tire or refrigerator can afford to do that because he gets many uses from that film.

A streetcar line could not afford to run for one customer even if they got a dime for their fare. Because they have many customers and they use their seats over and over again, they can get by. The same thing applies to many different purposes.

The whole theory behind the establishment of a library

service was to have a multiplicity of uses.

Q. And in order to have that multiplicity of uses, you must have theatres available in order to show the film?

A. Very definitely, yes, sir. The four theatres that we started out with 30 years ago was merely a starting point and if we did not get beyond four theatres, the whole idea, the whole scheme, would have been a dud. As it is, at the present time we are servicing approximately 22,000 advertisers. Now, if we divide our library usage up among those advertisers, and we have been in business for 30 years—not with that many advertisers, but say, roughly, if we have had for a period of 30 years half that number of advertisers, which

way or the other, we would have been servicing over that period of time we'll say an average of half of 22,000 or maybe 10,000 advertisers per year. So when you divide the cost of the library up among 10,000 uses by 10,000 advertisers, you have the unit cost of production down to relatively small amounts, which has enabled our company, as well as a number of others, to plow back into the business for development a surplus, you might say, or earnings, which of course is not possible for a small operator if he stays too small.

Q. You can't go out and sell an advertiser one of your library playlets for showing unless you know that you have the theatre available to show that film on his screen, can you?

A. Correct. Without the theatres there just isn't

any such business as ours.

Q. Now you stated that the so-called exclusive clause has been a part of your business practice since the begining of your business. From a business standpoint, will you state why you have included that exclusive clause in your contracts?

A. We found out-

Mr. Collins: (interposing) Mr. Examiner, I think that I want to object to that.

Trial Examiner Kolb: I think the witness may state the reasons for including it in the contract. The objection will be overruled.

A. We felt at the beginning, and it has [420] been demonstrated since in practice, that to have an exclusive contract we have an opportunity to serve both the advertiser and the theatre better. In the first place, when we went into this thing we found that the only advertising on the screen, or virtually the only advertising on the screen was slides and which were on there for showing for approximately five seconds, certainly not a very good form of advertising, as far as the sale of the service, because with the still slides there was no opportunity to demonstrate anything except to show a picture which could be shown just as well on a billboard or in a newspaper. In other words, there was no motion to a slide.

And another thing that we found, there were, off and on, films of an inferior quality that were shown on theatres, oftentimes to the extent of wearing them out physically and having what they call "rainy" prints, floppy. So the so-called theatre screen advertising business, as we found it, was certainly nothing to be proud of from the standpoint of the theatre or the advertiser, nor was it particularly liked by the theatre audiences.

So we rather felt that we were doing the entire in-

dustry some benefit by insisting upon exclusive contracts so that we could exclude the relatively inferior type of advertising, and also we found that on the theatre screen, that every advertiser, particularly in the

small town, objected to his competitor appearing on the same screen at the same time. So it was

our early practice or policy to definitely promise the advertiser that when his ad went on the screen, that no competitor would be there at the same time.

Q. Now right at that point, when you say any com-

petitor, what do you mean?

A: I mean, as an example, another drug store, if he is a druggist, or another automobile dealer in the same class of automobiles, if he was an automobile dealer. In the small towns particularly, where we have really done most of our business, I mean excluding the large metropolitan areas where we have never been strong, the local merchant has a very dirty word to say for his competitor as a rule. That word I will not be allowed to use in court, but you may understand what I mean.

Now whether that is right or wrong, it isn't up to us to say, but it is a matter of jealousy, personal pride and personal jealousy. So for our medium we felt, and I think it has been proved justified, that the exclusive privilege offered to an advertiser was a very valuable service to him. He could not very well ask that with a newspaper, a newspaper just couldn't afford to run. A newspaper has too many spaces to sell. So it was reasonable to offer to him and maintain to him an exclusive. Where we did not have an exclusive in a theatre, where another slide salesman or motion picture advertising salesman had an opportunity to go into that town,

and we had sold, we'll say, a drug store and we [422] had offered him an exclusive on the screen with

a playlet for the week wher. his playlet appeared, another salesman comes in and sells another drug store, he takes the ad to the theatre, the theatre may or may not run it, but if he does, both of the drug stores are sore. They both felt they had been trimmed, somebody has made a promise that wasn't kept and they commence to cuss each other. They go to the theatre and each

one of them tells the theatre this naughty word about their competitor, and that is an irritant to the theatre

man, too.

So we have always striven to try and keep the medium as clean and desirable and as far away from objections as possible. We just can't get along without the theatres. We have got to make the theatre happy. To make the theatre happy, you have to keep him out of trouble with his local merchants, keep these merchants from talking naughty to him, because he has got to live with them and he goes to the same clubs, the same luncheon clubs with them, belongs to the same churches and so forth, and he is just a human being trying to get along.

And our competitors in the advertising business feel

pretty much the same way about it.

Mr. Collins: Now I want to object to that, Mr. Examiner.

Trial Examiner Kolb: That last statement [423] may be stricken.

The WITNESS: Pardon, sir?

Trial Examiner Kolb: We will strike the last statement about what your competitors think. They will have to testify to that.

The WITNESS: Oh, I beg your pardon.

Q. (By Mr. Burgess:) Is it necessary, Mr. Alexander, to know that you have a certain number of theatres on whose screen you are certain of being able to show your playlets in order to be able to provide your library service?

Mr. COLLINS: I object to that.

Trial Examiner Kolb: Will you read the question, Miss Reporter?

(The question was read by the reporter.)

Trial Examiner Kolb: The objection will be overruled.

A. Yes, sir.

Q. (By Mr. Burgess:) Will you explain why that is true?

A. It is true on account of the fact that the production and maintenance and renewal of a library set of films is contingent upon a sufficient volume of business being obtained from the prints from those library films.

The only way that we can maintain a sufficient volume is to have a great number of theatre spaces upon which we can sell the services that are rendered [424] by these prints in exhibition.

In other words, it is necessary to have an outlet

for your product before the product can be sold?

Yes. sir.

Now does it or does it not frequently happen that if you have a non-exclusive arrangement with the theatre, your salesmen may go into a community and sell an advertisement of one of your drug store library films and then find that the screen has been filled by some other competitor?

A. That sometimes happens, yes, sir, or could.

Q. So that having taken the ad, you have no means of showing it on the screen because someone else has filled the screen for that period of time?

A. That could be true with regard to that particular

event or sale. .

Mr. Collins: Mr. Examiner, I want to object to that and make a motion to strike the witness' answer. It shows that it is purely speculative on his part.

Mr. BURGESS: I will clarify that in the next question.

Mr. Collins: I want to object to that, though, and move to strike that answer.

Trial Examiner KOLB: Read the last question and

answer

[425] . (Last question and answer read by the re-

porter.)

Trial Examiner KOLB: He has testified that that has occurred, and it is sufficiently specific, I believe, to overrule the objection.

(By Mr. BURGESS:) That is not an infrequent

ocurrence, is it, Mr. Alexander?

A. Sir?

Q. That is not an infrequent occurrence, is it?

Well, I would say that it happens quite often, 1. can't say just how often. It is difficult—we have no definite records of that.

[436] MICHAEL J. MCINANEY was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q (By Mr. Burgess:) Will you state your full name?

A. Michael J. McInaney.

Q. In what business are you engaged, Mr. McInaney?

A. Film advertising.

Q. And for what organization or company do you work?

A. Alexander Film Company.

Q. What is your official connection with the Alexander Film Company?

A. Vice-president in charge of sales.

[437] Q. And are you the general sales manager of the company?

A. Yes.

Q. How long have you been associated with the Alexander Film Company?

A. 24 years.

Q. And how long have you been sales manager?

A. Been almost 22 years.

[445] Q. And the forms of contract which are used by the company include a clause which in substance provides that during the term of the contract the theatre will not show screen advertising for any other advertiser, is that correct?

A. That's right.

Q. From the general sales manager's point of view,

will you state why that clause is in the contract?

A. Well, as I outlined the salesman's angle, it is in there for his protection and the theatre's protection. A good theatre manager will usually want to select a clientele and be careful of what he puts on his screen, and over the past 30 years it hasn't been easy to sign theatre agreements. Theatres don't take advertising because they like it. It's a minor part of their operation. They do like the money involved and in a group of theatres

it can amount to something, but a theatre manager is very conscious of his program. That is his goods in trade and if he gets any kicks at the box office on a feature or a short, he takes that to heart. Now if he gets just two or three complaints on screen advertising, he gets dubious as to whether or not he should run it for the money involved.

So we have tried over the years to put on a product that will have public acceptance, that the audience will not resent too much. In this short length of film we can't make entertainment, but we try to make it entertaining so there will be the least possible resistance

on the part of the public. So the theatre mana-

[446] ger, if we can sell him on the idea that if he will deal exclusively with us, that we will send him good films and he will have very little resistance from the audience, we finally convince him that he should deal exclusively with us, and over the years we have signed up about eight or nine or ten thousand theatres.

Q. In other words, you can't afford to guar-[447] antee the theatre a minimum amount per week for the use of his screen unless you know you

have the screen available for your exclusive use?

A. Well, you wouldn't buy an automobile if everybody in town was going to use it, would you?

Q. I don't think you answered my question, Mr. Mc-

Inaney.

A. Yes, we demand that exclusive privilege where we put up money and guarantee a minimum guarantee.

Q. Now, does your exclusive feature of your contract have any relation to the production and maintenance of

your library or playlets?

A. Yes, I figure a Mbrary of playlets is an investment of three-quarters of a million dollars, and you couldn't put that kind of money into production unless you had the outlets to service it and to sell it.

Q. In other words, you have to have the [448] place to show your film before you can produce

your product, is that right?

A. That's right.

Q. And you have to have the place to show your

film before you can go to your advertiser to sell him the product?

A. That's right.

[482] Q. (By Mr. Burgess:) Mr. McInaney, from your experience as general sales manager of Alexander Film Company, do you find competition in the film advertising field?

A. And how!

- Q. Wll you explain what that competition consists of, as far as theatres are concerned?
- A. Well, I would say 60 to 75 per cent of our theatre contracts, of which we have about nine or ten thousand, expire every year, and it is a wide open field for ourselves or anybody else to contact that theatre and try to make agreement with him. So the competition is very

keen in the theatre end of it because that is the

[483] crux of our business.

Q. Is that competition among all of the film

advertising companies of the country?

A. Yes, every one of them are striving to get theatre contracts and take them away from each other, to get new theatres to agree to sign up for advertising privileges.

Q. In the practical operation of obtaining the con-

tracts with the theatres, how do you get them?

A. Well, we solicit the theatre-

Mr. Collins: (interposing) Mr. Examiner, I think that has been gone into four or five times, to the best of my knowledge, the operation and the method of getting the contracts from the theatres.

Mr. Burgess: Its relation to competition has not been

gone into at all.

Trial Examiner Kolb: I will let the witness answer.

A. Well, our policy has always been to have every field representative call on a theatre, whether they are screening our service or a competitive service or no service at all. If they are screening our competitive service of any type, they ask them for the type of contract and when it expires, and so on, and they send us a note on this which we put on a follow-up system, and prior to

the time that the theatre contract expires with any other company, we go back and see this theatre man and try to sign him up for our company. That is the

general method. [484]

Q. (By Mr. BURGESS:) Now in the general operation of the business who gets that theatre?

Well, we get our share of them but we lose a lot

of them, too.

Well, how do you get them, in getting your share?

A. Well, we show them a reel of film. We try to sell them on the superior quality. We ask him what he receives a year from the competing company. We-try to meet or better that price, if we think it is salable; if we overbid the theatre, are unable to sell in a town, we maybe lose a theatre back to competition. If we get the prices right and the quality of service is right and the merchants are willing to buy at the price we offer it to them at and we can keep his space filled up, he is satisfied, he maybe keeps doing business with us year after year.

Q. Are you constantly losing theatres that were pre-

viously under contract?

That's right. A.

And are you constantly gaining theatres that other

competitors had under contract?

Yes, sir, we have a score board that shows how many we lose each month and how many we gain. If we start to lose more than we gain, why, we do something about it.

Q. Now, is there competition so far as obtain-

ing the advertisers is concerned?

Yes.

Will you explain the nature of that competition?

A. In the local field, if you have an exclusive theatre agreement, the competition will try to get a competing theatre or theatres, or a theatre in a nearby situation, se that they can sell service in the same town to the same merchants for other theatres. And then much of our business is done on a trade territory campaign, and these accounts are usually located in one central point and their advertising is displayed in a widespread area. The various film company salesmen solicit these accounts and try to get them to buy service from them for the theatres which they can furnish service in. There

is very violent competition in that type of client.

On the manufacturer programs the competition is very keen. We and every other film distributing company try to sell the manufacturer-dealer co-operative program and compete on it and until one of them gets a sale; usually if the manufacturer buys a series of films from us, that program is good for a year, but on the succeeding year the other competitors try to go in and take the deal away from us. So in the sale of any class of advertiser, it is a very competitive field.

Q. In competing for the advertising, does it or does it not result many times in the lowest bid obtaining the

contract for the advertiser?

[486] A. That would be true in the production of films unless you could show them the superior quality. There's other factors besides the price. Now, you have to sell for what the local merchant will pay. If you put your prices too high they will not pay, and our volume of business has enabled us to maintain a low price for service. Our service rate has increased 17½ per cent since 1941, and our other costs have been much higher than that.

For example, labor is the major part of our cost of doing business, and that has increased 871/2 per cent or

86 per cent since 1941.

Q. When you say your service cost, you mean the cost

to the advertiser?

A. Yes. Our base service rate has increased $17\frac{1}{2}$ per cent since 1941. I think our film cost has gone up 30 per cent since that time.

Q. The small increase in your cost to the advertiser,

is that by reason of competition?

A. Well, yes, we cannot sell in a town on a similar theatre for a higher rate than competition, or much higher. That governs the price of service to a local merchant and competition holds prices down; also volume of business enables us to keep our prices low.

[512] WILLIAM HARDY HENDREN, JR. was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

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Q. (By Mr. Cozad:) Will you state your name, Mr. Hendren?

A. William Hardy Hendren, Jr.

Q. Where do you live?

A. In Kansas City, Missouri.

Q. And in what business are you engaged?

A. Motion Picture advertising, film advertising business.

Q: And you are connected with the respondent in this case?

A. Yes.

Q. In what capacity?

A. As president.

Q. Mr. Hendren, how long has the United Film Service been engaged in the film advertising business?

A. Since 1924.

[515] Q. Now, Mr. Hendren, could United produce library or special film or manufacturer-dealer film if it did not have an outlet for the sale of these films?

A. No.

Q. What is the method of securing this out-

[516] let?

A. The method of securing the outlet is to contract with theatres for screen space, in which to display our films.

Q. You speak of contracting with theatres; do you

mean on an exclusive or non-exclusive basis?

A. On both bases.

.Q. Which method of contracting guarantees an outlet for United?

A. Well, the only method that guarantees us a definite market for our film is the exclusive film contract, because it is only in the case of the exclusive theatre

contract that we know that we have much space available, and that much space available for the screening of films.

[518] Q. Mr. Hendren, from your experience in the film advertising business, do theatres generally limit the amount of space which they have for sale?

A. Yes, they do.

Q. What is the usual limitation?

A. The usual limitation is 300 feet or not more than three minutes. That is the usual limitation.

Q. The space which the theatre allots for film advertising, does that constitute a remunerative sale, as far as the theatre is concerned, or is it free gratis, as far as the theatre owner?

A. No, that constitutes a very desirable extra source of revenue for the theatre, just as do some of the other concessions that the theatre has. The theatre man is in business to make money and if he builds a theatre or leases a theatre and there happens to be, for example, a small, little store just off of his lobby which might be available as a candy store or a store in which he can sell popcorn, he is interested in realizing the most revenue that he can from that store. So he either sells or leases the concession for the candy or the popcorn or he operates it himself to secure the extra revenue.

Well, in his program there is normally a breaking point between shows, and that breaking point can consist of only enough time to turn up the lights and let the audience that has seen the show file out and allow the new audience a chance to find seats, or it can consist of a little bit more time when the lights are put up and in its place he runs a limited amount of screen advertising that will produce revenue for him. So the time between shows represents a desirable source of extra

revenue and he uses it for screen advertising in

[520] many cases.

Q. In many instances, do you pay adequate consideration, do you pay him for the privilege of running screen advertising on his screen?

We pay him for the privilege and in many cases. it represents a very substantial portion of his total net profit in the operation of his theatre.

[522] Q. What is your experience insofar as the so-called first-run houses are concerned, either chain or independent, with respect to raving screening agreements with more than one film advertising com-

Mr. Collins: I object to that, Mr. Examiner.

Trial Examiner KOLB: The objection is overruled.

He may answer that.

A. My experience is that the better-class first-run circuit theatres do not desire to do business with two or more film advertising companies, but instead prefer to do business only with one.

Trial Examiner KolB: Now that answer will be stricken. The desire and preference of the theatre owner

I am not permitting him to testify to.

Mr. Cozad: Would you read the question, please?

(The question was read by the reporter.)

A. My experience is that they do business with only one company.

Q. Mr. Hendren, what is the average length [533] of United's exclusive contracts?

Well, that would be difficult to answer as to the average length.

What is the minimum and what is the maximum,

then? Well, the minimum is a year. We do have some exclusive contracts which will run for five years, but most of them will run two or three years.

And as I understand it, the majority of your exclusive theatre screening agreements, then, run two

or three years?

A. Yes.

Q. What is the average of terminations of your exclusive theatre screening agreements per year?

A. I would estimate in the neighborhood of 40 per cent.

Q. So that each year there terminate by lapse of time approximately 40 per cent of all of your exclusive screening agreements?

A. Yes. It will vary between 40 and perhaps 50

per cent, but I would think nearer to 40 per cent.

Q. Mr. Hendren, is United Film Service in direct and open competition with other film ad. distributors in the securing of theatre screening agreements and in the securing of advertising customers?

Mr. Collins: I object to that. That is a question for

the Commission's decision.

Trial Examiner KOLB: Read that question, please.

(The question was read by the reporter.) A

Trial Examiner KOLB: The objection will be overruled. Mr. COLLINS: Mr. Examiner, I would like to make this further objection, that it seems to be immaterial

and unnecessary because if the Examiner will look at the complaint, that is exactly what we allege. So I can't see that it is necessary to go in and ask this man's

opinion about it.

Trial Examiner Kolb: Well, he has a right to testify whether or not he is in competition with other film producers or whether he is not. So I think that has been more or less admitted in the answer to start with, but if they want to ask the question I think it is proper to go ahead and answer.

The objection will be overruled.

Mr. Cozad: You may answer.

A. Yes, we are.

Q. (By Mr. Cozad:) Is it common or uncommon practice, Mr. Hendren, for the United to secure screening agreements with theatres that have theretofore held screening arrangements with film advertising competitors?

A. Yes, it is common practice for us to do so. There is a great deal of competition in the securing of contracts with theatres, both independent theatres and circuit theatres, and as I stated before, approximately 40 per cent of all the contracts which we have with theatres containing exclusive clauses come up once a year for renewal, and when those times come we have a lot of

competition from the companies in the screen advertising business. Frequently we are successful in renewing our contracts, occasionally we will lose one to another competer who will take the circuit away from us because he makes a better proposition, overbids us, or at least the exhibitor thinks he is going to have a better proposition, and he elects to do business with him.

Q. Mr. Hendren, that competition is not limited to M. P. A. or Alexander Film Company or Reid H. Ray

Film Industries, is it?

No. it is not. We have competition from others. Not so long age we lost a circuit of theatres to the A. V. Cauger Film Service, and sometime ago we lost a circuit of theatres to an individual who is operating a screen advertising film service.

Q. Those two competitors you spoke of, is it not common practice for them to have exclusive screening agree-

ments with theatres?

Mr. Collins: I want to object to that.

Trial Examiner Kolb: What is your objection?

Mr. COLLINS: I object to his testifying as to the common practice of the others with reference to their contracts. I don't think that is material.

Trial Examiner Kolb: The objection will be sustained

as to the common practice.

[548] Mr. Hendren, you have stated that one of the reasons for film advertising distributors securing the exclusive screening agreements is that

[549] they must have a market for their product. Are there any other reasons?

A. Yes.

Q. Would you state what other reasons there are?

A. Only by having a known market for our product are we able to employ sales representatives and give them an opportunity to earn a good livelihood by knowing where they can go to sell screen advertising space, and when we have exclusive contracts with theatres, then our salesman, when assigned a territory in which there are a certain number of theatres with which we hold

exclusive contracts, has a definite known market where he can sell our screen advertising space, and he can, from that market, gauge his possible income. That is another good reason.

There are other good reasons. When we go in to solicit a manufacturer, on a manufacturer-dealer campaign, by having exclusive theatre contracts with theatres located in territories where he has key dealers, we can assure him of service for those dealers. If we were unable to give him a picture of our ability to serve a representative number of his key dealers, obviously he would be buying a pig in a poke. He wouldn't know what dealers could be served or have any assurance that they could be served.

It entails a very considerable outlay of capital to build a film library service and to maintain a service [550] organiation, and without a nucleus of evclusive theatre contracts, which is our basic market, we would be taking a very wild gamble to make the investment of capital necessary to build the proper film advertising service. That is another good reason.

It is much like a man going into business in a store. If he didn't have a definite—

Mr. Collins: (interposing) Mr. Examiner, I want to object to that as purely argumentative, the statement made by the witness.

Trial Examiner KOLB: He is giving his various reasons as to why there is an exclusive contract.

It appears to me now that you are duplicating, are you not?

The WITNESS: I didn't mean to, sir.

Q. (By Mr. Cozad:) Are there any other reasons, Mr. Hendren?

A. There are occasions when a film advertising company may need financial help, and when these occasions arise, in order to borrow money, one of the first things that any bank or any finance company wants to know before arranging financing for expansion and further improvement in building a business is to know, well, with what theatres and with what circuits do you hold

exclusive contracts, in other words, what is your known definite market?

[551] Q. Mr. Hendren, the reasons which you have just stated, have those been true from the inception of the film industry insofar as your connection with the film advertising industry is concerned?

Mr. Collins: I object to that.

Trial Examiner Kolb: The objection will be

overruled: A. Yes.

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[564] C. J. MABRY was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (By Mr. Rosen:) Will you state your name?

A. C. J. Mabry.

Q. Mr. Mabry, you are the president of Motion Picture Advertising Service Co., Inc.?

A. Yes.

Q. How long have you been president?

A. Since June 1st, 1948.

Q. Mr. Johnson was president, and upon his death you were promoted from vice-president to president, were you not, at that time?

A. Yes.

Q. What had been your capacity with the company prior to your election as president?

A. Vice-president in charge of sales.

Q. How long have you been connected with the company?

A. Since January 1925, approximately 23 years.

Q. I want you, for the benefit of the record, to state the history of this company, the nature of the business conducted by it and the growth from the time the company commenced until the present time?

A. Well, the company was organized in September 1921, and from that time until June, 1925, the company acted as a distributor of advertising

films; it might be termed an exchange of advertising

The main source of films at that time was Adogram's in St. Louis and Harcol Film Company in New Orleans. They produced the films and sold them to us, and we used those films to serve various advertisers that we sold.

During those years, acting as strictly a distributor on exchange of advertising films, we didn't make so much progress. And we also noticed competition moving on us with a life action film. So we organized our own studio in June 1925, and became a producer as well as a distributor, distribution not limited to our own films, but including other advertising film campaigns that we could purchase or rent, and we felt were acceptable to the theatres that we served.

From that time on, we have steadily grown from one of the smallest companies into, I believe, the second largest in the business today, from a volume standpoint.

I found, Mr. Rosen, in my various contacts, especially in the East, that there are very few people that know what you mean when you say the film advertising business and the motion picture advertising business, and so that anyone that might be called on to read this testimony will fully understand what is meant by motion picture advertising business or the film advertising business

ness, I would like to explain just what connection that business has with the theatre business.

Q. Proceed.

A. Years ago, as far back as I remember, which is 1918 and 1920, theatres had what they called a drop curtain, and this curtain was dropped down between performances or between acts of the theatre. And on this curtain the theatre had a certain number of ads, painted ads, which represented a supplemental source of income to the theatre.

I also observed that most of the theatres had a program. On this program they had a certain number of printed ads.

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Now, this concession, or supplemental source of income, was usually rented out or leased out for the privilege of

selling ads on that curtain, it was leased to some printer, some sign painter. It was handled by only one sign company, only one painter, because that was the only practical way that it could be handled.

Then along came the slide. The slide was merely a still picture that was projected on the screen. That is

what it amounted to.

Following the slide came the motion picture advertising film, such as we distribute, which to a certain extent—which has, in fact, replaced slide films and the curtain ads.

Recently there has been a trend on the part of theatres to take on another supplemental source of income, that being clock advertising. The theatre has one or

two places in the lobby or front where a clock can be placed and they rent that out to a clock

advertising company who sells one or two ads on each clock. That clock advertising privilege is sold to only one company, one clock company.

Mr. Collins: Mr. Examiner, I want to object to that testimony and move to sake it from the record. It is purely argumentative, Mr. Examiner.

Trial Examiner Kolb: He is explaining different forms of advertising used in the theatres. I will let him

go ahead. The objection will be overruled.

A. (Continuing) And recently I noticed that there is another form of advertising that has appeared in theatres, this form being a slide film projector in the lobby of the theatre on which slide film advertising is projected, advertising candy, popcorn, gum and other articles that are sold at the candy counter in the theatre. That also is leased out by the theatre to only one company.

[568] Q. (By Mr. Rosen:) Mr. Mabry, suppose you proceed now to tell us the various branches of your business, the organization, how that has developed.

A. Well, we have in our business four, you might call it five, departments. We have a production department that produces a library service, a journal library servive; also produces what we term as special library service.

ive, and it produces special films to order of advertisers.

We have a service department whose responsibility is the receiving of those films and the shipping of the films to the theatres and receiving it back from the theatres and shipping them out to other theatres.

We have an accounting department, which of course handles the administrative and keeping the records.

We have a sales department whose duty is to contact advertisers and sell advertisers, and we have a theatre procurement department. The theatre procurement department's responsibility is to make agreements with theatres to display advertising films produced by us and advertising films that we might distribute for other producers.

I think that the functions of those department [569] ments—I mean just the name of the department tells you what its function is.

Q. Which department or departments were under your supervision and management, specifically, up to the time you became the president of the company?

A. The sales department and the theatre procure-

ment department.

Q. By the sales department you mean the securing of advertising for advertisers?

A. The securing of advertisers.

Q. And the securing of screening privileges from theatres?

A. And the securing of screening privileges was handled by the theatre procurement department under my supervision, and on most of the circuit deals I personally negotiated the deal, approved it.

Q. That is, the securing of the screening privileges?

A. Of the screening privileges.

Q. What kinds of contracts does your company make with regard to the securing of screening privileges?

A. Well, we make contracts, under the terms of which we rent or lease all of the time and space that the theatre has for advertising, and we then, of course, lease that for resale to other advertisers and distributors, and then we enter into what is termed non-exclusive con-

tracts with some theatres, under the terms of which we are granted the privilege of running certain ads [570] up to certain limitations, the theatre placing limitations as to the number that they will run.

Then there are two general categories into which these contracts fall, one is the so-called exclusive contract, and the other is a non-exclusive contract?

That's right.

As I understand, the non-exclusive contract is one in which the theatre does not limit the screen space to one distributor but will permit more than one to show advertising on that screen?

They will permit more than one to show advertising on that screen provided they have space open, the usual theatre limiting the number of ads to a maximum

of six during any one week or at any one time.

Q. Now, with regard to the exclusive contract, there is in the record in this case some forms of contract that have been in use or are in use by your Company. I would like to ask you a question or two about those. Look for a moment at the one which is marked Commission's Exhibit 21; also look at the one, Commission's Exhibit 22; and then there is another one, Commission's Exhibit 23, Commission's Exhibit 24, Commission's Exhibit 25, and tell us which form is in current use, and would you explain for the record the differences between them?

A. Well, there is no material difference between any of these contracts. The wording is substantially

the same, the meaning is the same. The only big difference is in the layout, the way it is

laid out by the printer.

Q. Well, I notice that one of them, Exhibit No. 23, and also 24 and 25, have a caption, "Pro Rata Guarantee," which does not appear on the other exhibits. What significance has that?

Mr. Collins: Mr. Examiner, I submit the documents

speak for themselves.

Mr. ROSEN: If the Trial Examiner please, there are a lot of blank spaces left in these various things, and just for the sake of clarity, I am not trying to change the contracts, they are right there.

Trial Examiner Kolb: The witness may explain what a pro rata guarantee contract is. The objection will be overruled.

A. The pro rata guarantee contract—the word "pro rata" guarantee was put on that to differentiate this contract from a contract that was in common usage by competition, which was called a theatre collect contract.

Trial Examiner KOLB: You say 'was' in use; it is not

in use now?

The WITNESS: Very seldom do we come across it now. As a result, we dropped the words "pro rata guarantee" from our contract form.

Trial Examiner Kolb: Then Exhibits 23, 24 and 25, which are marked "pro rata" are old contracts

[572] which have not been used recently?

The WITNESS: Yes, they have not been used recently.

Trial Examiner Kolb: When were they discontinued? The WITNESS: Oh, I would say back in about 1945.

- Q. (By Mr. ROSEN;) Are you familiar with the theatre screening agreements presently in force with your company?
 - A. Yes.

Q: What is the length of time of the theatre screen-

ing agreements, the so-called exclusive contracts?

A. Well, the guarantee exclusives, one, two or three years, the no guarantee, that is, where we do not guarantee the theatre any minimum amount of money, will run one, two, three and in some cases five years.

Q. And the non-exclusive contracts, low long will

they run?

A. The non-exclusive contracts will run one, two, three and five years.

Q. On the average, what would you say about the length of term of the exclusive contract and the non-

exclusive contract with your company?

A. Well, I would say the average on the exclusive is about two years and the average on the non-exclusive is about three years. I make that statement based on the fact that we have approximately 4,600 theatres under

three years, that we have been called on to renew approximately 1500 of those agreements during each of the three years.

Q: Or about a third?

A. About a third. During the current year—I was checking up the other day, and I noticed that we are being called on this year to renew better than 3,000 of our theatre contracts that have come up for renewal.

Q. Out of the 4600?

A. Out of the 4600, which I haven't been able to find out just the reason why, unless it just happens that back in 1946 and '45 we were very aggressive in acquiring theatres, and they happened to fall due this year.

Q. Now, when a contract is made on a non-exclusive basis, what is physically done to the printed form which

contains the clause making it exclusive?

A. We merely scratch out the words which state that the exhibitor will not show advertising films that are furnished by any other than our company.

Q. And when the contract is made for a term of less than five years, what is done with the printed word

"five" that appears in these contracts?

A. We scratch out the word "five" and substitute in its place one, two, or three, dependent upon whether it is a one-year, two-year or three-year contract.

[577] Q. (By Mr. Rosen:) Mr. Mabry, does your company maintain a library, a syndicated film service?

A. My company maintains a library for approximately 40 different lines of business. By lines of business I mean such as drug stores, banks, service stations home appliance dealers, furniture stores, et cetera. We produce that library ourselves in our own studios.

Q. The studio is in constant production?

A. Our studios are in constant production. We turn out approximately 1500 individual advertising playlets each year.

Q. Would it be economically possible for you to main-

tain that library service if you did not have some exclusive theatre screening agreements?

Mr. COLLINS: I object to that.

Trial Examiner KOLB: The objection will be overruled.

A. We don't think so, Mr. Rosen, because without a few exclusive theatres we would have no definite market or outlet for those advertising films but would be de-

pendent upon a very uncertain outlet, which of course is the non-exclusive theatre, and we could.

n't afford to make the investment that is required to produce such a library of films, our average annual production cost running in excess of \$300,000 in the production of just those library films.

Q. I understand you to say that you have been in active charge, for many years, of the securing of screening privileges from theatres, did I get you right on that?

A. That's right.

Q. Do I understand from that that you mean you have personally handled that, or it has been just under

your supervision through your salesmen?

A. I have personally handled the signing up of most of the contracts that carry a minimum guarantee. In fact, I have accepted, I would say, near to 90 to 95 per cent of all those that have been signed up in the past ten years, with the exception of the three years that I was in the Navy, and at that time the president of the company accepted or signed those agreements.

Q. Is there competition between your company and others in the same line of business for the securing of

those screen privileges?

Mr. COLLINS: I want to object to that, Mr. Examiner. Trial Examiner Kolb: The objection will be overruled.

A. Yes, we run into competition in the secur-579] ing of every theatre contract, whether it be ex-

clusive, non-exclusive, or minimum guarantee. Recently I found that the theatres, or at least the better theatres than can command a minimum guarantee, are calling on us to bid against competition in practically all cases.

Q. You mean the theatre tries to get the most revenue it can from that screen?

A. The theatre is inviting us to bid for the screen space or the advertising space, the time on his screen.

Q. You mean by that, you have been invited by the theatre to bid in cases where you don't have contracts?

A. Yes, Mr. Rosen.

Q. What has been your experience, in charge of theatre procurement, in connection with losing some theatres

here and gaining some there, competition?

A. Well, naturally, competition outbids us in quite a number of cases and get theatres because they have a film product which is somewhat comparable, in fact is very similar to the film service or film product that we produce and that we distribute, and usually it gets down to a case of who will offer the theatre the most money or who will offer them the highest minimum guarantee.

Q. From time to time, do you receive any letters from various theatre owners with respect to these theatre screening agreements, that is, as to your securing this

contract where it has been previously held by a Competitor, or in other cases, competitors taking

them away from you and advising you to dis-

continue your service?

[580]

[581] (The documents referred to were marked Respondent's Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25-A, 25-B, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 for identification.)

to the respondent's exhibit 5 through 33, which have been marked for identification in that order, I waive identification and agree that they may go in.

Mr. Rosen: Just so the witness may know-

Mr. Collins: Mr. Examiner, I have waived identification and I submit the documents speak for themselves.

Trial Examiner KOLB: Exhbits 5 to 33?

Mr. Collins: That is right.

Trial Examiner Kolb: Exhibits 5 to 33? of counsel, will be received in evidence as Respondent's Exhibits 5 to 33, inclusive.

(The documents referred to, heretofore marked Respondent's Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25-A, 25-B, 26, 27, 28, 29, 30, 31, 32, and 33 for identification, were received in evidence.

Q. (By Mr. Rosen:) Generally what are the

letters marked 5 to 33, Mr. Mabry?

A. Those are letters we received from various theatres and theatre circuits, notifying us that they had given our competitors an exclusive screening agreement.

Q. Previous to that time, you had contracts with

these theatres?

A. Yes.

Q. And this v., a notice to you that they discontinued those arrangements and gave the business to competition?

A. That's right, Mr. Rosen.

[588] Mr. ROSEN: Well, counsel for respondent at this stage offers to prove by the witness, that the letters which have been marked for identification R-34 through R-54, are carbon copies of letters sent to this respondent through the mail, accompanying

[589] theatre screening agreements which had been formerly held by the addressee of the letter. The context of the letter indicates that a theatre screening agreement was being taken away from the competitor by

the theatre and given to our company.

I submit that the evidence is relevant and proper and

it should be admitted in evidence—these letters.

Trial Examiner Kolb: Do you incorporate in your offer of proof the fact that the letters are addressed to the Alexander Film Company and other film companies, and not to the respondent in this case, as might appear from your statement?

Mr. Rosen: Well, I want the statement to be fair.

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I said that the letters were addressed to the addressee who was a competitor. But so that the record is clear, all of the letters are addressed to the addressee who purportedly received the original of which this is a carbon, and the addressee in no case is the Motion Picture Advertising Service Company. Does that make the record clear?

Trial Examiner Kolb: And the writer of the letter is not the respondent. With those changes, the offer of proof will be received as an offer of proof. The objection

will be sustained to the documents.

Mr. Rosen: Now I want to be clear on your ruling.
Trial Examiner Kolb: I sustain the objection to the
documents. However, I admitted your offer of
proof into the record. Proceed from there.

Q. (By Mr. Rosen:) Mr. Mabry, did your company on or about July 25, 1945, obtain a theatre screening agreement from the Pastime Theatre at Clayton Hill, Alabama, Winfield, Alabama, and Guin, Alabama—Pastime Theatres, I should have said?

A. It is Carbon Hill, Alabama, not Clayton Hill. Yes. Q. Do you know what company formerly held the

theatre screening agreement with those theatres?

A. I know of one of the companie. The Alexander Film Company did hold a screening agreement with those theatres.

Q. And subsequent to July 25, 1945, your company

obtained a contract with those theatres?

A. As I recall, the date of the contract was July 25, 1945.

Q. Well, you have a right to refer to these to refresh your recollection. (Hands documents to the witness.)

Mr. COLLINS: Mr. Examiner, I submit that the witness is now tendered documents and instruments, which he is not able to identify and which the Trial Examiner has ruled out, to refresh his memory to give a statement of facts.

Mr. Rosen: Well, I certainly, if Your Honor please, have a right to ask this witness, who is in charge of sales, whether he has contracts with certain theatres, and these documents having been received by him, even

though they are not admitted in evidence, would refresh the time when these contracts were in force. I [591] will go through each one of them. I submit that is perfectly fair.

Mr. Collins: I would like to make the further observation that the accusation has been made that I am trying to waste time, and I submit that the record is full of testimony here that has gone in without any objection, that this man's company has lost numerous contracts to competitors and that the competitors have lost numerous contracts to this man. Now, why—if that has gone in without objection, I can't understand why the waste of all this time:

Mr. Rosen: We¹¹, I will admit that the evidence is corroborative of what has been said, but since you didn't object to the main statement, I don't see why you object to the corroboration of it. In any event, I will propose to ask the witness about each one of the theatres, whether we have a screening agreement.

Trial Examiner Kolb: Mr. Mabry, you say that you know that certain competitors have taken business away

from you?

The WITNESS: Yes.

Trial Examiner Kolb: Is your knowledge based upon the information contained in those letters?

The WITNESS: Part of the knowledge is, and part of it is from actual contact with the theatres, and the actual

taking of the ads off the theatre screens and seeing competition's ads going in place of ours.

Trial Examiner Kolb: The witness may testify as to what he knows of his own knowledge, but not as to what he obtains from an examination of correspondence which has been refused admittance in this case.

Q: (By Mr. Rosen:) Has your company a contract with the Tri-State Theatres, Dallas, Texas?

A. Yes.

Q. Do you know the approximate time when that contract commenced?

A. The contract was renewed, our present contract

was renewed about sixty days ago. Those particular theatres have been under exclusive contract to us for,. I would say, approximately three years.

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Q. Do you know who formerly had a contract with those theatres, which one of your competitors, I mean?

A. I couldn't answer that. I know that the Alexander Film Company had a contract with them.

Q. You mean just prior to the time you got it, but you mean you don't know who had it previous to that?

A. Well, while Alexander had a contract, others might have had a contract with them, in fact, I think we did, a non-exclusive contract, and we got it on an exclusive basis and have held it on an exclusive basis since.

[593] Q. So for about the past three years you have had it on an exclusive basis?

A. That's right.

Q. Are you familiar with the Dunlap Theatres in Dallas?

A. Yes.

Q. Has M. P. A. a contract with the Dunlap Theatres at the present time?

A. Not at the present time. We recently lost those

theatres to competition.

Q. What period of time did you hold that contract?.

A. We had a contract up until approximately four months ago, when those particular theatres changed hands, and when they changed hands, competition secured an exclusive contract.

the recess I was going over, one by one with you, some copies of letters which related to certain theatre screening agreements which you had obtained Rather than to take the time to put in such corroborating proof, suppose I limit the testimony from here on out to just the general overall picture, and I will ask you a few questions along those lines which I think will serve the same purpose.

When you came with the company in 1924, it had been in operation for about three years, I understood you to say, or from 1921 to 1924?

A. I came with the company in January of 1925. The company had been in operation about three and a

half years then.

Q. How many theatre screening agreements did the company have at the time that you came with the company?

A. Approximately 300 operations, confined to the States of Mississippi, Louisiana, and the Southwestern

corner of Alabama.

Q. When you returned from your service in the Navy, it was in the latter part of 1945, was it not?

A. No, it was in January 1945.

Q. January. How many theatre screening agreements did the company have upon your

return from the Navy?

- A. Well, the company was shipping films off and on to approximately 3,000 theatres, but no attention had been given to the renewing of our screening agreements during the three years I was away. So we actually had agreements with possibly 1500 theatres.
- Q. But by oral arrangement were continuing to ship to about another 1500?

A. That's right.

Q. Making about 3,000 in all?

A. 3,000 we were operating with.

Q. That was in January 1945?

A. Yes.

Q. How many theatre screening agreements does

your company have now?

A. We have signed screening agreements with approximately 4,600 theatres now, and we do business on a verbal basis with possibly another 200.

Q. You testified as to the States' territory, that the company did business in in 1924; would you give us substantially the States' territory you now do business in?

A. The company now operates in, I think it is 28 States, from Arizona across to Texas, Arkansas, on up

to Kentucky into Pennsylvania and on up to Maine.

Q. So that in addition to renewing some of the contracts which had expired while you were in the Navy, that you said the total of which was about at that time 1500 that had expired and another 1500 in force, since your return agreements have been

entered into with about another 1600 theatres?

A. In addition to those we had in January 1945,

that's right.

Q. Was it always the practice of your company to seek to obtain exclusive theatre screening agreements ever since you have been with the company?

A. Since January of 1925, it has been the practice to attempt to secure exclusive agreements with theatres that might be termed highly salable to advertisers. Those that we didn't consider too salable, we didn't offer them any guarantee. We would take an exclusive agreement if they offered it to us, of course.

Q. In the securing of those contracts from 1924 up to the present time, did you find that your competition was also securing or attempting to secure exclusive con-

tracts?

A. I found-

Mr. Collins: (interposing) I object to that.

Trial Examiner Kolb: State the ground of your ob-

jection.

Mr. Collins: It isn't a question of what the competition was doing because it may be that the competition is violating the law, and that would be no defense to a proceeding against this respondent.

Mr. ROSEN: If the Trial Examiner please, I

the government in the complaint is that the exclusive feature of these theatre screening agreements offers an insuperable obstacle, or at least a substantial obstacle to competitors of these four respondents in the obtaining of theatre screening agreements. I think I have a right to show that if that was the condition that existed from the inception of the industry and our company has succeeded in building up theatre contracts from 300 to now 4600 in the face of that exclusive fea-

ture that competitors were obtaining, that it is not an insuperable obstacle and that clause does not tend to substantially lessen competition. I want to show what the effect of that clause has been on the industry in general.

Trial Examiner Kolb: The objection will be sustained. Mr. Rosen: Counsel for respondent offers to prove by this witness that since the inception of this industry, exclusive screening—

Trial Examiner Kolb: (interposing) Just a minute, Mr. Rosen. You can approach what you are talking about in a different manner. I am taking the position that the question that you asked is not proper.

Mr. ROSEN: You mean the form of the question?

Trial Examiner Kolb: Yes. Let's don't clutter up the record with offers of proof. You have got an opportunity of presenting it in the proper way.

Mr. Rosen: Well, I didn't know the objection

was to the form of the question, I thought it was to the substance of it.

Would you give me my last question?
(The question was read by the reporter.)

Q. (By Mr. ROSEN:) Mr. Mabry, you personally handled the securing of theatre screening agreements for M. P. A., did you not?

A. For approximately the past 15 years, yes.

Q. During that time, you have already testified that your company attempted to obtain from theatres exclusive contracts to screen your film ads. correct?

A. Yes, and actually secured them.

- Q. And in some cases you did. In going out to obtain these theatre screening agreements from theatre owners and managers, did you find in some cases that competition had the theatres under contract when you first called?
 - A. Yes.
- Q. Were such contracts in some cases exclusive contracts, in which the theatre screen had been leased to enly one distributor?

A. Yes.

Q. How would you go about getting those screens for M. P. A.?

A. Well, I would present various sales arguments to the effect that we could make more money for the exhibitor. That was the main one. To the effect that if he gave us a screening agreement, that we would provide him with a quality or standard of films which was superior to those he was then showing; that we maintained, or would maintain, a regular sales staff to work his theatres, and that he would be assured of a definite revenue month after month, and that by dealing with us only, that we would eliminate the confusion that quite often arose when two or three different companies were selling ads for his screen.

During recent years, I would say the past ten years, when we have been able to get films that were produced by other producers, I pointed out to him the fact that through the present theatre coverage we had and through our present extensive organization, that we were able to act as an exchange or distributor for producers, other producers of film, and that we had that film available for sale to advertisers, as well as the film which we produced, and by having this broad line of film or service to offer to advertisers, that we were in position to produce more revenue for him, or come nearer keeping his screen filled than those companies that did not have such an extensive library or service to offer. And, as a result, we were quite often quite successful in signing up exclusive agreements with theatres.

Q. In the case of these minimum guarantee [600] contracts, you found it necessary in those cases to offer the theatre a minimum revenue, irrespective of the number of ads that you could put on the screen?

A. It is necessary to offer a minimum guarantee to most any individual theatre or circuit of theatres today that is popular with the merchants or salable to the merchants. There are very few first-run theatres that show ads today that will make an agreement with you unless you do give them some minimum guarantee.

Q. And the theatre owner was interested in the total revenue, the amount of those guarantees as compared.

with what competitors offered for the screen?

Mr. Collins: Mr. Examiner, I want to object to that and I would like to say here, to keep from interrupting counsel, that I will from now on after each question where counsel doesn't ask a question but makes a statement for the witness to place his stamp of approval.

Trial Examiner KOLB: You are asking for a continu-

ing objection?

Mr. COLLINS: No, I don't ask for a continuing ob-

jection.

Trial Examiner Kolb: You are not going to leave it to the Trial Examiner to decide whether or not an objection shall apply; you will have to make your own objection.

Mr. Collins: I am going to do that after each question. I object to this particular question as leading.

Trial Examiner Kolb: Read the question, please.

(The question was read by the reporter.)

Mr. ROSEN: I will withdraw the question and re-

Q. (By Mr. ROSEN:) By and large, Mr. Mabry, what would you say was the most important factor in your being able to obtain theatre screens exclusively for Motion Picture Advertising Service Company?

A. First, I would say, is the money-consideration

we offer.

Q. To the theatre?

A. To the theatre. Second, the fact that we have a product that is acceptable to other theatres.

[611] Q. (By Mr. ROSEN:) Mr. Mabry, at the hearing in New Orleans on April 28 of this year, Mr. Weigand of Commerce Pictures testified that he had tried to obtain a contract with the Jefferson Amusement Company and had not been successful in obtaining a theatre screening agreement. In 1944 was the time that he was talking about. Did Motion Picture Advertising Service Company obtain a theatre screening

agreement from Jefferson Amusement Company in 1944?

A. No, but I made an agreement with them in June 1945, after the Jefferson Amusement Company had given Mr. Weigand a test, which he mentioned in New Orleans, and after he had also given Mr. Reichart a test run on his theatres.

Q. Was the Jefferson Amusement Company at the time of entering into your contract, doing any advertis-

ing on its screens?

A. No, but they were open to a proposition and had been for approximately two years.

Q. Did you negotiate that contract yourself,

[612] personally?

A. I negotiated personally.

Q. If you went in in 1945, then I take it that that was after this test run had been made by Mr. Weigand?

A. It was after the test run by Mr. Weigand:

Q. And after these several pictures had been shown by Mr. Reichart they testified about in Houston?

A. It was afterwards.

Q. What sort of a contract did you get from him?

A. I made a three-year exclusive agreement with him. Mr. Rosen: That is all the questions I have.

CROSS-EXAMINATION

Q. (By Mr. COLLINS:) Mr. Mabry, you testified that those distributors who did not take the exclusive contracts had gone out of business, is that right?

A. Yes, sir.

Q. Now, was that because they didn't have any thea-

tres to get into?

A. No, sir, there were thousands of non-exclusive theatres they could get into, but non-exclusive theatres do not represent a definite market, and as a result, you cannot maintain or hold a sales force with all non-exclusive theatres, because it involves too great a risk on the part of the salesmen in time and traveling expense to properly cover those towns and those theatres where they operate on a non-exclusive basis.

[613] Q. Well, the fact remains that all those who haven't got exclusive contracts have gone out of

business?

A. Yes, as far as I know.

[619] Q. But if all of the theatres were left open, don't you think that you would stand as good a show as anybody else in making money out of the business?

A. I don't think anybody could make any money out of the business, even stay in business, if all the theatres were open, because you couldn't maintain a library service, which is essential to continuing in business, you couldn't maintain a sales force, which is essential to continue in business. At the present time, we may have an exclusive town here and another exclusive one here and two or three non-exclusives between. By routing our salesman to this exclusive one, he has to go through the other one, so he will stop and check with the theatre manager and will quite often find space open and quite often pick up a contract, which is to us a more or less supplemental source of income rather than a prime source of income.

Roughly, 75 per cent of the volume of business that we do is on screens that will not screen ads for other people. The other 25 per cent comes from that large group of non-exclusive theatres that we are constantly fighting our salesman to work and which he doesn't want to work, because the risk in time and traveling expense is so great, and if I didn't have those exclusive towns to route him to so he would pass through the non-exclusives, I would never get him in there.

Q. Then he goes to the exclusive towns because he knows that he hasn't got any competition to buck?

A. No, sir, he goes there because he knows he has something to sell. He has something definite to sell, he has certain spaces open. He carries with him—our salesman carries with him what I call a territory inventory. In that territory inventory he has a slip on every transaction in his territory, including here is a theatre that allows, we will say, four or five ads; back of that he has a slip on each customer sold and the service schedule on that customer. So he can tell at any

moment, by reference to this book, just what service is open in any town where we have an exclusive agreement. That isn't true on the non-exclusive agreements.

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Q. Now you do, I believe, work with approximately, I believe you said, 200 theatres with which you did not

have any contracts?

A. Other than a verbal arrangement, and most of that 200, or at least a half of that 200, happen to be theatres that will not run ads for anyone else except us.

Q. And with those you have success without the

existence of an exclusive contract, do you not?

A. My verbal arrangement with those particular-

Q. (Interposing) I would just like for you to answer my question.

A. Yes,

Q. And you have-

Mr. Rosen: (Interposing) I submit, though, the witness has a right to answer and then explain his answer.

You may explain your answer.

Mr. Collins: The witness hasn't asked for any time to explain.

Trial Examiner Kolb: Proceed with your next ques-

tion. Let's get through. ...

Q. (By Mr. Collins:) And you have any number of theatres under contract which wouldn't do any business with anyone else but you, even though you didn't have the contract, do you not, Mr. Mabry?

A. I stated I had approximately a hundred such theatres that I do business with on a verbal arrangement, which verbal arrangement, in my opinion, is just

as good as a written exclusive agreement.

Q. Well, you have any number, though, with which you have exclusive contracts, which would do business with you without the contracts, do you not?

A. I couldn't answer that, because I am doing business with them on a contract basis and I don't know whether they would do business on a non-contract basis or not. If I was a theatre I wouldn't, because I would have no assurance of that definite income month after month.

Q. You did business with them before you got the contract, didn't you?

A. With those particular theatres?

- [622] Q. Yes,
- A. No, I stated I had approximately a hundred theatres that would do business with no one else. I have approximately 200 who are on verbal contracts. The other theatres insist on a contract.

Q. And you did do business with them, though, before

they insisted on a contract, did you not?

A. No, sir.

Q. You didn't do any business wth them?

A. Not the other 4400 we are talking about.

Q. And with those you never had done any business at all?

A. Not until I got a contract with them.

Q. Well, Mr. Mabry, did they know anything about the quality of your merchandise?

A. The theatres I do business with?

Q. No, those with whom you obtained contracts that you never had done business with before you received the contract?

A. Well, they knew the minute I made a solicitation for a screening agreement. They didn't know about it before that unless they did from some of my advertising. In that case, some of them wrote to me and said, "I would like for you to submit a proposition," and I did so and submitted samples of my product. Others, I approached them.

I have right now an appointment, within the next few days, with a large circuit of theatres that has written to

me and asked me to come in and make a bid and bring over my best in the way of product, because they are going to adopt a policy of start-

ing to run advertising. That's happened on numerous occasions.

Q. Now, when you run screen films for others, on what terms do you run those advertising films?

A. On the standard A.A.A. commission rate of 15 per cent commission and 2 per cent cash discount.

Q. That is to all distributors?

A. That is to all distributors and all advertising agencies. I look on another distributor as just another sales agency for me. Four A's stand for American Association of Advertising Agencies.

[627] REDIRECT EXAMINATION

Q. (By Mr. Rosen:) Mr. Mabry, the list that Mr. Collins asked you to look at, which is marked respondent's 4-A through 4-i, is headed "Producers of 35 Millimeter Advertising and Commercial Films." I'd like to show you the other exhibit that went in about the same time, marked respondent's 3, which is entitled, "Producers and distributors of 35 millimeter Film Advertising Trailers," and ask you if that is not the list of those companies who are competitors in the field of distributing film advertising?

A. I recognize quite a number of the names

[628] on here.

Q. As I understand, the heading of the first list respondent's 4, is, producers of commercial films, whereas list 3 is producers and distributors.

A. The heading on the No. 4 list I don't think is complete, because those people engage in the production as well as distribution of some type of advertising film.

Q. Well, be that as it may, do you recognize on the sheet, which is marked R-3, competitors of your company who do undertake to secure theatre screening agreements direct from the theatres and actually screen the production?

A. Yes.

Q. There is no use reading off, there they are.

A. Yes, I recognize a number of them.

Q. Would you say that is a partial or a complete list?

A. Well, I would say it is a partial list, because there is another film company in New Orleans that recently opened there and is giving us a lot of trouble. There are three of us operating in New Orleans now—four, in fact: Commerce Pictures, Harfilms—and what is the name of this new company that recently opened up there?—and of course the Alexander Film Company has given us a lot of trouble. There is also a new com-

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pany recently opened in Lake Charles, Louisiana, I don't see their name on here.

I saw in the paper the other day where there is a company opened up in San Antonio, Texas; their name doesn't appear on here.

Q. So you would say this is a partial list?

A. That is a partial list.

Q. But in general they are the chief competitors you would have in this business, except as you just stated?

A. I wouldn't say that because there are several other companies that we run into that are not listed on that.

Q. Do their names come to your mind?

A. I am just trying to think what the names are. They are not large companies. They are small companies that operate on the basis of moving from one territory to another territory. There was one that recently opened in Pittsburgh, Pennsylvania, that is approaching the subject of film advertising on a little different basis. They have a camera crew that moves around with the salesman. They have got these light cameras and the salesman goes into a town, the camera goes in at the same time with him, and he makes pictures of the man's place of business and his specialized advertising story and gets it shown on the theatres.

We have found a number of our exclusive theatres running this service. It came to our attention through complaints that we received from customers of ours that we were booking films in. He said, "I see that you put a competitor of mine on the screen during the same week I am on there. How come? And he has

got a different type of film." That is how I happend to learn about it.

Mr. Rosen. That is all I have to ask.

RECROSS-EXAMINATION

- Q. (By Mr. Collins:) Do you recognize all of those
 - A. All of those people on that list?
- Q. Yes.

A. No, sir.

Q. If you don't recognize any of those people, how do you say that they are competitors of yours?

A. This list?

Q. Yes.

A. I didn't say that they were competitors of ours. I said I recognize some of our competitors. I recognize some of the names, was my answer.

Q. Didn't Mr. Rosen ask you if those were competi-

tors of yours?

A. I believe Mr. Rosen did, and I believe I answered to the effect that I recognized some of those names on there that they are competitors of ours.

Q. How many of those would you recognize as com-

petitors of yours?

Mr. Rosen: Suppose you look at it and put it in the record. (Hands document to the witness.)

[631] Q. (By Mr. Collins:) Call them out.

A. All right. Alexander Film Company, Colorado Springs, Colorado. Strickland Film Company, Atlanta, Georgia. Filmack Trailer Company, Chicago, Illinois. I see the name Parrot Films on here, but I haven't stumbled into it. I know the name very well and I know they engage in the business, but I haven't stumbled into them on the territory we cover.

Commerce Pictures, New Orleans, Louisiana; Harfilms, Inc., New Orleans, Louisiana. Ambuter Motion Picture Company, Boston, Massachusetts. Reid H. Ray Film Industries, St. Paul, Minnesota. A. V. Cauger Service, Independence, Missouri. United Film Service, Kansas City, Missouri. National Screen Service Company, New York, New York. Jamieson Film Laboratories, Dallas,

Texas.

Q. Now, how many of those would you say were comparable to the Motion Picture Advertising Company?

A. You mean in size?

Yes.

A. From the standpoint of volume done?

Q. Yes.

A. I am not familiar with-

Q. I am speaking about volume of business. You

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travel over quite a bit of territory, don't you?

A. Yes, sir.

[632] Q. And you are very familiar with the volume of business done by the different concerns, are you not?

A. I have what I think is fairly accurate information as to the volume of business done by the other companies.

Q. All right now, Mr. Mabry, with that in mind would you give to us the names of those that you consider comparable to the Motion Picture Advertising Company?

A. From a volume standpoint?

Q. Yes.

A. Alexander Film Company, United Film Service, Reid Ray Industries, and possibly A. V. Cauger Service. I am not too familiar with their operations but they have been moving in recently on us quite a bit in the Arkansas and Kentucky, Tennessee area, I have reports on. But the others, from the best of my knowledge, I don't think that—well, I would say National Screen Service, they are getting very active in the distribution of films for national advertisers. They haven't bothered us in the strictly local field yet.

Q. And those that you have named are the only ones who are giving you any serious trouble, are they not, Mr. Mabry?

A. No, Commerce Pictures is giving us quite a bit of trouble. They are located in New Orleans. They have taken theatres away from us recently on an exclusive basis, and I understand that they are more or less deviating from their plan of having state distributors, and they are now starting to handle their

own distribution and sales on a direct basis, that is, through their own sales organization and service organization.

This Strickland Film Company in Atlanta gives us a lot of trouble at certain seasons of the year, particularly around the Christmas season. They go out and sell a lot of advertisers on the idea of sponsoring a Merry Christmas and a Happy New Year type of service.

Q. Only spasmodic?

A. Well, they are spasmodic, but I am told that they are getting a considerable amount of money from the advertisers, which means that it cuts down on the amount of schedule that I can sell the advertiser when I go to him. They charge an enormous amount of money for that service, which might cut an every-other-week contract down to an every-fourth-week contract, and they do it, of course, through the influence of the theatre. The theatre has a certain amount of influence, the most influence being the pass. So he gives them a few annual passes to hand, out and they are able to get a much higher rate for their service.

Q. Did you ever see them hand out any annual

passes?

A. Yes.

Q. You have seen the theatres hand them out?

A. I have had them sent to me to hand out. The fact is—

Q. (Interposing) So they were not only handing out to that company, but they were also handing out to you?

A. Not as a general practice.

[634] Q. Oh, do they do it as a general practice to

the others, from your knowledge?

A. Only from reports received from our salesmen, which in my opinion is just as good as if I had been there and seen it myself.

Q. You don't know of your own personal knowledge?

A. No.

Q. You do know that they send them to you?

A. I do know some have handed-passes to me to use in selling contracts.

Q. Now, there, the merchants liked the merchandise of your competitor so well until they were willing to pay more for the other merchandise than they were paying for yours?

A. No, he was willing to pay more in order to get

that pass.

Q. I thought you said you never did see them give any passes only to you?

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A. I said that I knew from reports received from my sales organization.

Q. You knew from hearsay?
A. That is the way I get the information that they are in competition with us, from our salesmen. I haven't un directly into competition with this Merry Christmas, Happy New Year service, but I have a sufficient numper of reports from my salesmen to know it is going on.

Q. So you are reporting in your testimony

[635] what somebody else told you?

A. In regard to that particular testimony regarding the Strickland Film Company at Atlanta, I

But the fact remains that they did pay more for Q. the other fellow's merchandise than they paid for yours?

A. That is what my salesmen told me. Mr. Collins: I believe that is all.

JAMES G. RANDAARD was thereupon called as 656 a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

(By Mr. Hodgson:) Your full name?

James G. Randgaard.

Where do you live?

Staples, Minnesota."

Q. What is your or apation?

Theatre owner. A.

·,Q. Do you own a theatre in Staples. I do.

A.

was.

[657]

Are you also connected with the Home Theatre Company?

A. I am.

What is your connection with the Home Theatre Corporation?

I am president.

You have heard the testimony of Mr. Nygaard this morning?

A. I have.

Q. Heard all of it, did you?

A. Yes.

Q. The theatre you own in Staples is not—do I understand, is not part of the Home Theatre Company chain?

A. It is not.

Q. Yes. You independently own that theatre.

A. I do.

[660] Q. Are you under exclusive contract now with Ray-Bell Films with respect to the independent theatre at Staples?

A. I am, yes.

Q. Since what date?

A. Sometime in '46. September, I believe.

Q. Prior to that did your independent theatre show film ads?

A. Yes, sir.

Q. Did you have any exclusive contracts with respect to film ads prior to that time?

A. No, sir.

Q. What was your experience with respect to the film ad business prior to the time you had the exclusive contract?

A. My experience was that if I wasn't there there would be some fellow come in from out of town or some other company and sell a merchant and overload the screen. That is the trouble I was getting with that kind of set-up. In other words, I would have seven or eight on instead of six—five or six.

Q. Did you ever also have an experience that when the theatre was open, so to speak, the screen wasn't

filled up to the maximum of six.

A. That would happen in some cases too, yes.

[661] Q. What has been your experience with respect to the screen loads since you have had your exclusive contract with Ray-Bell Films?

A. It's been 100%, much better supervised.

Q. Your experience with the independent theatre at Staples also applies to your experience with the Home Theatre chain of theatres.

A. Same.

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Tr Th Tr [667] MARTIN LEBEDOFF was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (By Mr. BURGESS:) Will you state your full

A. Martin Lebedoff.

Q. What business are you engaged in, Mr. Lebedoff?

. Operate two motion picture theatres. Are you the owner or manager?

A They are owned by a corporation which I am an officer of.

Q. How long have you been in the business of operating theatres, Mr. Lebedoff?

A. Twenty years.

Q. During your operation of theatres have you run film advertising on the screens f the theatres which you have been connected with?

A. Yés.

Q. Have you had the experience of running screen advertising for more than one advertising film company at a time?

A. Yes.

[668] Q. Do you at this time do business with more than one film advertising company?

A. No.

Q. Will you state what your experience has been in handling film advertising for more than one advertising film company at a time?

Mr. Collins: Mr. Examiner, I want to object to that, because I think the testimony is immaterial and irrele-

vant.

Mr. Burgess: Mr. Examiner, this is following, I think, a perfectly competent line. It's asking a theatre owner or manager for information as to his experience in the business. It isn't asking him to reach conclusions or reasons for doing a particular thing, but it's asking him to explain what his experiences have been.

Trial Examiner Kolb: Objection will be overruled.

The WITNESS: May I proceed? Trial Examiner Kolb: Yes.

The WITNESS: At a period of time when we had more than one advertiser on our screens we found it to be unsatisfactory because it bred competition between the two advertisers and tending to lessen our personal standing in our community because the businessmen we were associated with in our own particular neighborhoods couldn't quite understand what was going on when one

couldn't quite understand what was going on when one salesman would quote a price and set of condi-[669] tions and another would quote a different price and set of conditions, and we depend a lot on

good will for a good portion of our business.

Mr. Collins: Mr. Examiner, I want to object to that line of testimony. I want to object to the statement made by the witness and if the ruling is that the testimony should go in I would like for the witness to be advised to confine himself to the experience that they have had, and not for an argument.

Trial Examiner Kolb: Read that answer, so far as it's gone.

(The answer was read by the reporter.)

Trial Examiner Kolb: The objection will be overruled with the understanding that, as previously agreed upon, Mr. Collins, the attorney for Complainant, will have an objection to the testimony of this witness as being incompetent, irrelevant and immaterial. The Trial Examiner will reserve disposition of this motion subject to a motion to strike at the close of the testimony.

Mr. Burgess: Mr. Trial Examiner, it seems to me that this is following a different line than calling upon the theatre manager to testify as to why he prefers a particular thing, asking him to state his experiences in order that the record may show what the experience of the theatre has been in the handling of his business. It

isn't quite the same thing as we were talking about this morning, and I am attempting

avoid that very thing, to have the witness state

Trial Examiner KOLB: Off the record.

Discussion off the record.)

Trial Examiner KOLB: On the record.

Q. (By Mr. Burgess:) You may proceed.

A. It was also our experience that our revenue suffered under having more than one company servicing our screen. We received less for our share when we had more than one serving the theatre and the service we received was inferior because at times there were ads of two competing businesses in the neighborhood on the screen at the same time, or even under the same period of the contract and that led to difficulty with some of the advertisers, and also occasioned a surplus of ads in one week and a dearth in another week, instead of having that evened out, although there are some theatregoers that do object to seeing too many ads when going to the theatre, and I would like to keep them at a minimum number. I think that's about it.

Q. Do you recall the number of screen ads that are shown on your screens?

A. Yes.

Q. How many ads do you permit at any one [671] time?

A. I am not exactly familiar with it. There is a little latitude. I think either three or four.

Q. What has been your experience in doing business

with only one screen advertising company?

A. We find that our return has been greater, our service has been better. We have been able to keep the good will of the neighborhood merchants because there has been no competition for screen ads among them. There hasn't been two ads for one type of business running at the same time and we have been able to supervise the operating of it a little easier. After all, there are less people to do business with. We don't have six ads one week and none the following. We have approximately three each week.

Q. Do you from time to time renew your arrangements for doing business with one company or change

it over to another company?

A. Yes.

Q. At the time that your contract for renewal or change-over comes up, do you have other screen advertising companies come in and attempt to get your business?

A. Yes.

Q. When you have two or more of the screen advertising companies attempting to obtain the contract for your screens, what items do you give consideration to in granting a contract?

A. Revenue that I can receive and service

[672] that I can get.

Q Is it true that when you say revenue received, you mean the highest amount that will be paid to you for the screening is a consideration that you—

A. (Interposing) It is a combination of price per

ad and total revenue over the term of the contract.

Q. So that as between two or more screen advertising companies with a comparable product it is a question of the revenue to you.

A. I would say that is the chief consideration.

Mr. Burgess: I think that's all.

[679] Q. That condition has been for fifteen years with one theatre.

A. No. It wasn't always exclusive. •

Q. It wasn't.

A. No, sir, we have advertised with various companies at various times, sometimes on an exclusive basis and sometimes we have had more than one at the same time.

Q. How long have you had a contract on the exclusive basis?

A. The last three or four years. Prior to that we had two in there for a period of time, probably two or three or four years. I am not exactly sure.

Q. And they could not keep your screen filled.

A. Beg your pardon?

Q. The two could not keep your screen filled with film advertising.

A. They didn't.

[680] JOHN BERNARD DOUGHERTY was thereupon called as a witness for the Respondent and, having been previously sworn, testified as follows:

Trial Examiner KOLB: I think Mr. Dougherty was sworn at the previous hearing.

Q. (By Mr. BURGESS:) Will you state your full

name?.

A. John Bernard Dougherty.

You are in the film advertising business.

A:

You are a distributor of film ads.

A. Yes, sir.

You have testified previously in this proceeding.

A. Yes.
Q. How long have you been in the film ad business?
A. Twenty-five years.
Q. Did you at any time use films produced by the Parrott Film Company?

A. Yes, sir.

Q. Will you state what your experience was in the use of those films as far as the theatres and your advertisers' satisfaction was concerned?

Mr. COLLINS: Mr. Examiner, I want to object

to that.

Trial Examiner Kolb: What was your objection, Mr. Collins?

Mr. COLLINS: I don't think it is material what their experience was with reference to the satisfactionwhether or not the films of the Parrot Film Company were satisfactory or unsatisfactory.

Trial Examiner Kolb: I think the evidence might be material as to whether or not they are able to place the films at the various theatres on that basis. I will overrule the objection.

(By Mr. Burgess:) I can restate the question but I think we will just go ahead-just answer the question.

Will you answer the question, Mr. Dougherty?

A. About Parrott Films?

Q. Yes.

Yes, I used Parrott films during the war when films, of course, were rather hard to get and, although the Parrott Film Company did the very best it could for me in supplying the films, they were, at the time I received them some three years old-they had been pro-

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duced three or four years previously. In other words,
I mean they had nothing current to give me.

They were dated back three or four years, but that is the best they could give me. The second thing was that in Minneapolis and St. Paul we used a length of film, sixty feet of film, and their films were only twenty feet long instead of sixty, so they were too short, and there wasn't anything I could do about that, because that is all they had and the advertisers here in Minneapolis were not satisfied with that type of film. However, I do not blame the Parrott Film for that. I blame it more on circumstances on account of the war, but the whole sum and substance of that was that I could not hold the accounts I had on the screen by using these Parrott films because they were not suitable for the advertisers. In most cases they were too old. They weren't the right footage.

Q. Did you have complaints from your advertising

customers?

A. Yes, we had that to battle all the way through, that the films were old and they were too short and they weren't suitable for their business.

Q. Did you lose advertising business because of that film?

A. We lost a percentage of our business through the fact that these films didn't have enough to satisfy the advertiser.

Q. Did you have complaints from the theatres in the

use of those films?

A. Yes, in some cases the theatre men either told me to get these films off the screen or get out of the theatre, that we had to remedy that, we had to change

and get a better product. They didn't care how

[683] we got it but they told me we had to get it.

Q. When did you stop using Parrott films?

A. I stopped using those four and a half years ago, I believe, with one or two exceptions where they have made a special film for me and which they retained the negative and I ordered prints of that negative, but I ordered no more of their so-called playlets that I had a used for four and a half years, I believe. I don't know

just how accurate that is. That is pretty close.

Q. Whose films did you obtain after you quit using the Parrott films? Whose film did you obtain after you sto bed using the Parrott films?

A. I obtained the United Film Ad Service films for

a short duration.

Q. Was that film a satisfactory type of film?

A. Yes, it was.

Q. Did you have any complaints from your advertisers on the use of that film?

A. No, we did not have any complaints.

Q. And did you have any complaints from the theatres?

A. No. They congratulated me.

Q. You testified that you lost business while using the Parrot films. Did you regain any of that business after you started—

A. (Interposing) On the strength of the better film we did regain and recover a certain

amount of the business.

Q. What is the condition of your business at the

present time?

A. Well, it is better than it has ever been in the history of the game, for the simple reason that we made one more change from United film to the Alexander film. The reason for my change was purely a financial set-up with me, but since I have been using the Alexander films I have been able to get a better class of advertisers. I have been able to keep the ones I have and I have been able to go up a notch in the category of the advertisers on account of Alexander films, for the simple reasons that they have everything that I would require in Minneapolis or St. Paul to service an account properly.

Q. Your business is now gradually growing, is that

correct?

A. It has increased since the time that I started projecting Alexander films on the screen, yes.

Q. You did recover some of your business while you

were using United films.

A. We had even recovered some we did not get when

I was with United films. I've got that since I went

over into my new set-up on Alexander films.

Q. In the operation of your business have you had the experience of dealing with theatres where more than one screen advertising company were showing their ads?

A. Yes, I have had a lot of experience.

[685] Q. As a distributor what has been your experience where there is more than one screen ad company showing on the same screen?

Mr. Collins: Mr. Examiner, I want to object to that on the same grounds I made with reference to the testimony of the other witnesses on that line of testimony.

Trial Examiner Kolb: Objection will be overruled.

Q. (By Mr. Burgess:) You may answer, Mr.

Dougherty.

A. My experience in trying to conduct this business in the Twin Cities has just been this: That unless I have an agreement with a theatre man to sell advertising for his screen on an exclusive basis I cannot stay in business. That is the main point with me. I just simply cannot be in the advertising business without an agreement from a theatre on an exclusive basis. However, I have operated perhaps a little different than some of them to this extent: My contract, in the true sense of the word, is not an exclusive contract with any theatre man. It is an agreement whereby I sell and run film advertising on his screen, but it does not bar any other company from operating on that screen through our company. The main idea of getting a contract from a theatre man is to protect him-protect myself.

Mr. COLLINS: Mr. Examiner, I submit that the Respondent has able counsel and I want to object

[686] to this witness trying to take over the duties of the counsel in arguing this case, and I move to strike this testimony, his last statement in the record.

Trial Examiner Kolb: Off the record.

Discussion off the record.)

Trial Examiner Kolb: On the record. Overrule the objection with the suggestion, however, that the witness follow the questions asked by the examining attorney

and not volunteer statements.

. Mr. Burgess: I think the question probably was con-

ducive to the witness going far astray.

Q. (By Mr. Burgess:) Will you proceed with your answer, Mr. Dougherty, and limit your answer to your experience or experiences in the field of advertising where there is more than one distributor on the screen at the same time.

A. Just what specific question would you like to ask me now?

Q. Just what are your experiences—do you have.

anything to add to what you have already said?

A. No, I think that saying that I can't operate without an exclusive contract and stay in business—I think that covers the whole thing. In my particular case if I have got an agreement with a theatre to show my advertising I am not in business.

Q. You mean by that you must have a speci-[687] fic outlet or number of outlets in order to con-

duct your business at all?

A. I must have a place to show my ads.

Mr. Burgess: That's all.

Mr. Collins: Just a minute, Mr. Dougherty. CROSS-EXAMINATION.

Q. By Mr. COLLINS: Mr. Dougherty, you remember being interviewed by Mr. Van Wagoner of the Federal Trade Commission on May 4th, 1944?

A. I do.

- Q. You remember that Mr. Van Wagoner on that occasion asked you with reference to the Parrott films?

 A. Yes.
- Q. And you told him that you were able to get some new films from Parrott, did you not?

A. What? I didn't hear you.

- Q. Didn't you tell Mr. Van Wagoner on that occasion that you were able to get some new films from Parrott?
 - A. New film?

Q. Yes.

A. Only special film, only what we put together ourselves and ordered from them, but nothing out of their stock in trade, library films. I will explain the word library—that means a classification of a group of films that will cover all lines of business that I may sell to, each and every line.

Q. You remember discussing this matter with

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[688] us on the last—that is, when we were in Minneapolis, do you not?

A. Yes.

Q. Don't you remember telling me on that occasion that the Parrott Film Company handled library films?

A. That they were

Q. (Interposing) That they handle library films.

A. They had library films.

Q. Yes.

A. That's right, I-said they had library films.

Q. And you told me the other companies had library films, did you not?

A. That is correct.

Q. And did you make this statement on that occasion down in your office here that "library films were library films, regardless of who made them"?

A. Well, that would sound like an awful foolish question to me, about library films being library films,

to this extent-

Q. (Interposing) I am not asking you how foolish it may be. There may be a lot of this that I think is rather foolish, too, but did you not make that statement on that occasion?

A. That library films are library films? Correct.

Q. Yes, and didn't you make the statement to Mr. Van Wagoner that you had lost a third of your business on account of these exclusive contracts?

A. On a certain group of theatres, yes.

[689] Q. And didn't you also make the statement to Mr. Van Wagoner that these exclusive contracts were a pain in the neck to you?

A. I mighe have felt hurt about them because I would

have liked to have had them.

Q.s And didn't you tell me on the occasion when we discussed this with you in your office down here that they were not necessary to the business?

A. What was not necessary?

Q. The exclusive contracts were not necessary to the business.

A. Well, I couldn't operate without an exclusive contract.

Q. I am asking you what you stated to me on the occasion that I discussed it with you in your office back in the spring of this year.

Mr. Burgess: Mr. Examiner-

The WITNESS: (Interposing) That's all right, let's get this—

Mr. Burgess: (Interposing) Mr. Collins is now attempting to get into evidence something that he didn't see fit to put in evidence when this man was his own witness. He called him as his own witness and now he is attempting to impeach his own witness.

Mr. Collins: I am not attempting to impeach my own witness. This man called him back here and I submit, Mr. Examiner, I'm very thoroughly taken by surprise at the testimony of this witness. I can't understand—

Mr. Burgess: (Interposing) It's no fault of .

[690] mine.

Trial Examiner Kolb: I think this cross-examination up to this point is proper. Objection will be overruled.

The WITNESS: Well, I want one thing thoroughly understood, that I am not going to lie knowingly on my testimony, no matter what the question is.

Q. (By Mr. COLLINS:) Are you able to show any of the films, your advertising films, in theatres with which the Alexander Film Company has exclusive contracts?

A. To advertise them in those theatres?

Q. Yes.

A. Yes, I do.

Q. How long have you been doing that, Mr. Dough-

A. For this last two years. I made a mistake the last time you took testimony here by overlooking the fact. I said no; but I should have said yes. I was operating one of the theatres in St. Paul at the time I said no, so I was operating two years or more ago—I was running my film in one of their theatres.

Mr. Collins: Mr. Examiner, I would like to have a minute here.

Trial Examiner Kolb: Beg your pardon?

Mr. Collins: I would like to have just a minute here to read this.

[691] Trial Examiner Kolb: Take a recess for five minutes.

(A short recess was taken.)

Trial Examiner Kolb: Ready to go ahead, Mr. Collins?

Mr. COLLINS: Yes.

Q. (By Mr. Collins:) Mr. Dougherty, you remember in April of this year that a Mr. Depro and I called at your office and discussed this matter with you?

A. Yes.

Q. And you remember during the course of that interview that I stated to you that the Respondents in this case were contending that it was absolutely necessary in the operation of the business to have exclusive contracts?

A. Yes.

Q. And do you remember that you stated to me on that occas on that it was not necessary to have an exclusive contract?

A. I would like to explain that to you.

Q. Just answer my question, Mr. Dougherty.

A. I can't recall. I would like to see just my answers—me remembering back what I said in April is pretty hard. Now, if you tell me right out that I said that, that's different. Then I will try to answer that.

Q. I am not telling you, Mr. Dougherty, anything you said or may have said. I am asking if you remem-

ber having said that.

A. I can't remember exactly what I said on [692] that occasion about an exclusive contract.

don't believe that I would talk against an exclusive contract because I actually had exclusive contracts at that time.

Q. Don't you recall on that occasion, Mr. Dougherty, that you said that the contracts with the advertisers run for a specific length of time and that was a sufficient length of time for the advertiser to contract with the theatre?

A. I might have said that. Yes. I might have said

that, yes.

Q. And don't you recall on that occasion that you stated yourself that you took the exclusive contracts in Minneapolis in self defense?

A. Yes, that's definite.

Q. Do you recall on that occasion that you took great pains to point out to Mr. Depro and myself the difference between those contracts and the contract of the Alexander Film Company?

A. Yes, sir.

Q. And the Ray-Bell Film Company.

A. Yes, sir.

Q. And do you recall on that occasion what you stated yourself with reference to the extent of the business that you had lost because of the existence of the exclusive contracts held by your competitors?

A. I would make such a statement, yes.

Mr. Collins: That's all.

REDIRECT EXAMINATION.

[693] Q. (By Mr. BURGESS:) Mr. Dougherty, it is true, is it not, that the library film that you were obtaining from the Parrott Film Company was old and out-of-date during the war, was it not?

- A. I think in answering that it will clear up in Mr. Collins' mind, as well as mine, a little difference of opinion between him and I—library film is library film, as M. Collins asked me. However, the date of the library film makes a vast difference in the effect of library film. The films that I got from the Parrott Film Company, as stated, were made before the war and they have made no library films since that time. Therefore it became out-of-date. So I merely changed from their library film, which was out-of-date and which I could not use, to library film that Alexander put out, which is made according to the times, that is, it is right up to the minute. Is that what you want to know?
- Q. Yes. Now, their library film was also a shorter film than the Alexander Film, was it not?

A. Half as long, exactly half as long.

Q. So that while library film may be library film, there are different kinds of library film.

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A. Very much so, yes.

Q. Has it ever been your feeling, Mr. Dougherty, that you could not continue to maintain your business without exclusive contracts.

Mr. COLLINS: Is object to that.

[694] Trial Examiner KOLB: Objection overruled.

The WITNESS: Answer it?

Mr. Burgess: Yes.

The Witness: It isn't pessible for me to stay in business and attempt to buck other companies without protection from the theatre man with an exclusive contract. I just simply have to quit—all my efforts in these past years have gone for nothing.

Q. (By Mr. Burgess:) Now, it may be true, as asked by Mr. Collins, that you may have stated to him that it was not necessary to have an exclusive contract with the theatre for any longer than the advertiser's contract,

is that right?

A. That is correct, because we do not endeavor—at least I never have made a practice of asking a theatre man to give me a long time contract. I have always left open to the theatre man that "should we wish to change . . ." that in writing a contract for one or two years, that at the end of that time if he is not satisfied with the way I have conducted my business and run the films on his screen he may make a change to some other company. That is the theatre man's right.

Q. It may also be true you told Mr. Collins you have lost business to other advertising film companies be-

cause of the exclusive contracts.

A. Of course I have lost business.

[695] Q. Do you recall in the cross-examination by Mr. Donnelly when you were on the stand last spring, your testimony, in which you said in part: "I would say that the average theatre man prefers to do business with one film company"?

A. I remember that.

Q. Do you remember further that you stated: "The reason is that he can rely upon that film company to

govern the number of ads that are placed on his screen to eliminate more than one company calling on the same account in an effort to sell that screen"?

A. Yes, sir.

[700] Q. But you think now that you ever told him or anyone else that an exclusive contract was not

necessary in your business.

A. I don't believe I would word that question by saying that they were not necessary in my business because in 1944 they were necessary in my business and I had exclusive contracts, so I couldn't very well tell Mr. Van Wagoner otherwise, unless I was nuts.

ARTHUR EDWARD Fox was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

- [701] Q. (By Mr. Burgess:) Will you state your full name?
 - A. Arthur Edward Fox.
 - Q. Where do you live?
 - A. I live at 3942 Cedar Avenue South.
 - Q. St. Paul, Minnesota?
 - A. Minneapolis.
 - Q. Minneapolis, Minnesota.
 - A. Yes.

Trial Examiner KOLB: Has Mr. Fox testified before or was he here and not called?

Mr. Burgess: He was here and not called.

Q. (By Mr. Burgess:) And what business are you engaged in, Mr. Fox?

A. I am a representative for the Alexander Film

Company.

- Q. How long have you been a representative for them?
 - A. Very nearly four years.
 - Q. By representative, is that the same as salesman?
- A. Salesman.

 Q. Before working for them had you been engaged

in the film ad business?

A. Yes, I had.

Q. For how long?

A. I was with Mr. Dougherty—as close as I can come, I think about sixteen months—sixteen or eighteen months. And then I left him and I went into partnership with another man. His name was Andre Pinet. I was with him maybe about eight months.

Q. While you were with Mr. Dougherty did you act as saleman, contacting theatres and prospective adver-

tisers?

A. Yes, sir.

Q. From whom did Mr. Dougherty obtain his film at that time?

A. Parrott, down in Des Moines, Iowa.

Q. And it was the Parrott Film that you were selling to the advertisers and showing on the theatre screens?

A. Yes, sir.

Q. You were with Mr. Dougherty, you say, about sixteen months.

A. Yes, sir, approximately that.

Q. And during what years was that, Mr. Fox?

A. I think that was in 1941 and '42.

[703] Q. (By Mr. Burgess:) Will you explain what type of films the Farrott film was that you were using at that time?

[704] A. Well, its photography, for one thing, was

very poor. The characters-

Mr. Collins: (Interposing) I want to object. I understood counsel asked for the type of film and not the quality of the film.

Mr. Burgess: All right, I will include quality in the

question.

Mr. COLLINS: Well I object to it.

Trial Examiner KOLB: Objection will be overruled.

Let's get finished.

The WITNESS: They were shorter. They didn't live up to the standard length that our competitors had and they were old films. They were films that had been produced—well, like Mr. Dougherty says, three or four

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years ago. To me it was more like twenty years ago. We did have quite a bit of success in selling them but after the advertisers got to see them, why, they were very much disappointed and we had quite a bit of difficulty keeping our accounts and our renewal business was—there just wasn't any. That was one of the disappointments I had while I was with—it was no fault of Mr. Dougherty's, it was just the quality of the product he had to sell.

O (By Mr. Burgess:) Now, they were a very old film

you were trying to distribute.

"A. Very old, yes, sir.

[705] Q. Did you lose business? A. Yes, sir.

Q. Did you have complaints from your advertising customers?

A. Yes, sir.

Q. And you lost advertisers?

A. Yes, sir.

Q. Did you have complaints from the theatres?

A. The theatres also, yes.

Q. And did you lose theatres because of the film?

A. Well, some.

Q. Now, was that true all the time you were with

Mr. Dougherty?

A. Well, yes it was just a discouraging thing. You just kept plugging along but you just had an inferior product that you were trying your best to sell.

Q. Now, after you were with Mr. Dougherty for about sixteen months you went into partnership with

Mr. Pinet?

A. Yes.

Q. That is Andre Pinet that had in conjunction with you an advertising film company here in this area?

A. Yes, sir.

Q. And how long were you with him?

A. I was with him I think about eight or nine months.

Q. Was he at that time just starting the [706] film advertising business for himself with you?

A. He had been associated with Mr. Dough-

but they severed their connections and he went out here and at Mendota where he lives—and talked me into going in with him on this little company. We called it the Co-operative Film Company. He made me a partner. We were both to go out and sell and acquire whatever theatres we could and split our profits.

Q. That was the first time Mr. Pinet had been in

the business for himself?

A. I think so, yes.

Q. While you were with Mr. Pinet what advertising film did you use?

A. We had to use the Parrott film.

Q. And it was the same sort of library film that you had been obtaining while you were with Mr. Dougherty.

A. Yes, sir, Lthink it was.

Q. What was the reaction of your advertising customers to that film that you used while you were with Mr. Pinet?

A. Well, it was practically the same. I run into the same thing, condition, that I would when I was with Mr. Dougherty. Although I was erating in a different section when I was with Mr. Pinet. I was out in the rural area: these little towns aren't quite as fussy as they would be here in town, so I didn't get quite so

many kicks, but it was discouraging. It was

[707] very discouraging.

Q. Did you get much renewal business from the advertising?

A. No, sir.

Q. Did you get complaints from the theatres?

A. Yes, sir, I did. Lots of it.

Q. Did you have any difficulty in holding those theatres as customers?

A. No-I just couldn't hold them. Unless I was

able to get a different product.

Q. Now, you left Mr. Pinet after you had been with him about six or eight months.

A. Yes, sir.

Q. And was it at that time that you went with the Alexander Film Company?

A. Yes, sir, I was real disappointed and I knew there was a wonderful field for this type of advertising. I wrote to the Alexander Film Company and told them what I was doing, what I was trying to do, and asked them if they had some opening in this territory.

Q. A: how long have you been with them now?

A. It will be four years this coming April, April 15th.

Q. And you have been engaged in the same type of work as you were while you were with Mr. Pinet and Mr. Dougherty?

A. Yes, sir.

Q. Has there been any improvement in your [708] ability to obtain contracts with advertisers?

A. As big a difference as day and night.

Q. Now, will you explain that just a little bit. That

doesn't tell us much on the record.

- A. Well, I've got the best quality merchandise on the market to sell and when a man has that feeling, why, it's a lot better than the kind of going—walking backwards into a store before you got nerve enough to get him and tell him what you got. You haven't got anything to show him in the first place. But when I carry an Alexander kit I got my beautiful colors and I got a nice library, it don't matter who I am talking to, why, I have a film available for him.
- Q. Have you been able to build up the number of your advertising customers?

A. Oh, yes. Yes, I have

Q. Have you been able to build up the number of theatres with whom you have contracts for the Alexander Film Company?

A. Well, I have shown an improvement in my territory. I have more houses now that I am selling than

when I first started-more theatres, I mean.

Mr. Burgess: I think that's all.

[716] Trial Examiner Kolb: Mr. Fox, just a minute. When you speak of old films of the Parrott Company, you have reference to the old subject matter or the condition of the film itself?

The WITNESS: Well, for one thing the condition of the film itself was very poor. After a film becomes a year old it becomes brittle, becomes a fire hazard, so in making our splices, putting our name trailer to the playlet, that was one of the things we had trouble with. It wouldn't stay. It would clog up in the machines, Then, too, there would be such old characters. My God, suits that we wore years ago. It was laughable. And then the shortage—the playlet, like Mr. Dougherty in his testimony said, the playlets were just half of the ordinary—half of what the ordinary playlet should be. That was the number three that we had.

Trial Examiner KOLB: That's all.

G. RALPH BRANTON was thereupon called as 7181 a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

(By Mr. Cozad:) Would you state your name, Mr. Branton, please?

A. G. Ralph Branton. Q. Where up you.
A. Des Moines, Iowa. Where do you live?

With what company or companies are you connected at the present time?

I am connected with Tri-State Theatres Corpora-

tion only.

Q. And what business is the Tri-State Thea-[719] ters Corporation engaged in?

A. We own and manage picture theatres.

And in what State or States? Iowa, Nebraska, and Illinois.

And can you tell us approximately the number of theatres within that chain, Mr. Branton?

Approximately 57.

What is your official title or capacity with the Company?

A. General manager.

Q. And how long have you occupied that position?

A. Since 1933.

Q. As general manager of the Tri-State Theaters Corporation, do you have charge of all advertising, screen advertising, that is placed on your screens?

A. Yes.

[721] Q. What is the underlying reason, Mr. Branton, for Tri-State Theaters Corporation having screen advertising?

A. Pure and simple money only, the income from

the screen.

Q. In other words, that constitutes and supplements your regular box office income?

A. Yes: it adds to our income.

Q. Do you consider, and have you found, that screen advertising handled by one film advertising distributor has proven to be satisfactory?

Mr. CLLINS: I want to object to that, Mr. Examiner.
Trial Examiner Kolb: The objection will be overruled.

The WITNESS: Would you repeat the question?

(The reporter read the question.)

A. Well, it is satisfactory as screen advertising can possibly be.

•Q. (By Mr. Cozad:) And what are the reasons for

that conclusion, Mr. Branton?

A. Well, I made up my mind for Tri-State Theaters the only way we could continue to run screen advertising was to make a firm guaranteed deal whereby we would get a sustantial sum of money from whoever ran our screen ads and be assured of a definite income and

have a definite control on the number of ads we ran and the type of ads we ran, and from that standpoint our present arrangement is sat-

isfactory.

It is the only way that I could have full control over it and know that we were going to get a specified income sufficient to warrant the running of ads at all.

[724] Q. Have you exhausted the possibilities of determining whether or not that guaranteed income would be forthcoming if you dealt with any num-

ber of screen advertising distributors?

A. Well, frankly, it didn't seem there was [725] anybody very vitally interested in our screen advertising except Mr. Hendren. We have come to the conclusion a long time ago that unless we could get a substantial sum of money we were not further interested in running screen advertising, and he was the only one, or his company, that met that condition, and I don't believe from my experience that it is possible to have more than one company handling the advertising for a group of theaters as compact as ours. It could not possibly return the revenue that we demand.

Q. (By Mr. Cozad:) Expand the reasons for your conclusion, Mr. Branton; that is, why wouldn't any number of film advertising distributors produce for Tri-States as much revenue as one film advertising dis-

tributor?

A. Well, first, we set out the amount of money per year that we want returned from the number of theater screens which we permit to run theater advertising. Second, we outline the maximum number of screen ads which we will permit on the various screens and that varies as per the theater.

Then we say regardless of what you sell, we expect this amount of dollars per year, and we figure that almost to the maximum. Therefore, it is reasonable to understand that if a man didn't have the sole right to.

solicit for that total number that he couldn't

[726] return me the maximum amount.

Q. All right, Mr. Branton, you stated in [727] answer to my previous question that you very definitely limit the number of screening spaces or screening time with respect to film advertising. State what, from your experience as a manager of a-

A. General manager.

Q. —general manager of a theater chain, film advertising does so far as your audience reaction is concerned:

A. You are asking for the audience reaction to screen advertising?

Q. Too much screen advertising.

A. Well, first, I don't believe the audience likes any screen advertising; second, we certainly know that if we would give them more than just an amount which doesn't actually offend that we would lose customers.

Q. What is your experience with respect to the number of ads as a general over-all picture

of all theaters, that you must not exceed?

A. Well, of course, that varies. I don't want to get into any argumentative situation here again. The different types of ads make a very great difference. If they are cheap little ads, two is too many. If they are good, clean advertising with good backgrounds and good music accompanying them, we consider that, in a certain class of house, up to five won't offend.

Q. Translate that into time, Mr. Branton.

A. Oh, a minute or a minute and a half to 2 minutes would be top.

Mr. Cozap: I believe that is all.

[729] CROSS-EXAMINATION.

Q. (By Mr. COLLINS:) You find the reaction of the public, though, they are against all screen adver-

tising, aren't they, Mr. Branton?

A. Well, let me explain now without trying— I started out personally by being prejudiced against screen advertising. Therefore, I look upon the public as resenting screen advertising if it isn't handled very delicately and very cleverly and very quickly—

Q. You are just-

[730] Mr. Cozad: Just a minute. Had you finished your answer?

A. (continuing) — because we have had reaction in our various theaters over the years wherever we get to a greater length of advertising I have talked about here we get a violent reaction.

[737] Q. Do you mean that the proposition that the United has made to you, that the same proposition would not be profitable to other screen distributors?

A. It couldn't possibly be. It couldn't possibly be. They have to maintain an organization to sell film, and they can't do it with a spasmodic arrangement or a partial arrangement in some given town. It is just plain arithmetic.

[741] Myron Blank was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

- Q. (By Mr. Cozad:) Will you state your name, please, Mr. Blank?
 - A. Myron Blank.
 - Q. Where do you live? .
 - A. Des Moines, Iowa.
- Q. With what company or companies are you connected or associated at the present time, Mr. Blank?
- A. I am general manager of the Central States Theaters and secretary of that and Tri State Theaters Corporation.
- Q. How long have you occupied the position of general manager of Central States?
 - A. Since January 1, 1947.
- Q. And as general manager, are you charged with the responsibility of determining whether to have screen advertising, and if so, how much and from what [742] company or companies?

A. That is my responsibility.

- Q. Mr. Blank, in your experience in the theater business, presently as general manager and your previous connections with theaters, have you found that it is necessary or advisable to limit the number of screen ads that are displayed upon the screens) of the theaters of Central States?
 - A. Definitely; yes.
- Q. What is the primary reason or objective of Central States having any screen advertising?

A. I am sorry. I don't have that question.

Q. I will reword it. I think it was a little long and

involved. What is the primary purpose or object in screen advertising so far as Central States chain is concerned?

A. I think we have two definite reasons. First and primarily is revenue to the theater. Second, because Central States theaters are mainly operated in small communities we believe it is a service to the local merchants due to the fact that there are no radio stations, generally weekly newspapers, and that our patron's attention can be reached better by screen advertising than perhaps any other medium, and therefore, the merchants are given a service of advertising that would not be available to them if it hadn't been for the screens.

Q. Notwithstanding the second reason which you have just given, Mr. Blank, have you or have you not found it necessary and advisable to very strictly and [743] stringently limit the number of screen ads that you display on your individual screens?

A. May I answer that in a broader way than you asked the question. Yes; it is necessary to limit our ads. Experience has taught us to. The theaters that we operate consist mainly of partnerships where we have only an interest in the theater with a local manager retaining an interest.

In Mason City, Iowa, the local manager not only retains the interest in the operation and partnership with us, but also retained for his wife all privileges of screen advertising. She, I believe, was buying ads from anybody and everybody because that was revenue that went into her personal pocket. The result in Mason City, because of that policy, was that the city council passed an ordinance, three readings in one night, prohibiting screen advertising in the theater. The ordinance was never published because we immediately moved in and wanted to know why they were taking such drastic steps, and they explained that—

Mr. COLLINS: Mr. Examiner, I submit that is a little

Trial Examiner KOLB: I think the conversation with the city council probably would be hearsay. The ob-

jection is sustained as to that portion.

Q. (By Mr. Cozad:) Your conclusion, Mr.

[744] Blank, is, as I understand it, that unlimited screen advertising, if carried to extremes, creates a very bad and adverse audience reaction?

A. It definitely creates a bad, adverse reaction. Secondly, it ends up giving the advertiser very little for his money because there is a confusion with too many ads, and third, we can only sell playing time in our theaters, and if you multiply screen advertising by the number of shows per day you are going to run into a tremendous amount of free operation of your theaters.

For example, if you were to run 5 minutes of advertising and you have five shows a day, that means your schedule is taken up 25 minutes by screen advertising and therefore reduces the turn-over in your theater.

[753] W. R. ARNOT was thereupon called as a witness for the respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

- Q. (By Mr. Cozad:) Will you state your name, please, Mr. Arndt?
 - A. W. R. Arndt.
 - Q. Where do you live, Mr. Arndt?
- A. Ruthven, Iowa.
 - Q. That is R-u-t-h-v-e-n?
 - A. Right.
 - Q. And how long have you lived there?.
 - A. Since /1932.
- Q. Are you presently engaged in the ownership and operation of a motion picture theater?
 - A. I am.
 - Q. Where is that theater located?
 - A. At Ruthven, Iowa.
- Q: Have you ever operated and owned a theater in any other locality?
 - A. At Everly, Iowa.
 - Q. That is E-v-e-r-l-y?

A. E-v-e-r-l-y.

Q. State when you owned and operated the [754] theater at Everly, Iowa.

A. November 1, 1945, and sold it March 1,

1948.

Q. In your operation at Everly, did you ever show film advertising, Mr. Arndt?

A. Yes, sir; I did.

Q. Whose film advertising did you show there?

A. When I bought the house in November, I was handling Ray-Bell from St. Paul, and there was oh, I would say 3 or 4 months later, I handled S & M—S & F or S & M.

Q. Is that Joe Meyer's service out of Omaha?

A. I imagine it is. I don't recall the salesman's name, but it was S & M that I had.

[764] Q. Mr. Arndt, in your experience have you found it more satisfactory and more profitable to do business with one film advertising distributor?

Mr. COLLINS: I want to object to that.

Trial Examiner KOLB: The objection will be overruled, subject to a motion to strike.

[765] Q. (By Mr. Cozad:) You may answer.

A. Well, I like to run-

Q. The question is: Have you found it more satisfactory and profitable?

A. Absolutely.

Q. What are your reasons?

A. Well, when I operated at Everly I had United Film, S & M, and United, all three.

Q. You stated United in the first place. U ited,

S & M, and who else?

A. Ray-Bell. At that particular time I felt that I was running too many ads so I cut them down, and when the contracts expired with Ray-Bell I went exclusive with United Film. Consequently, when I opened my new house I made up my mind that I was going to go with one film company only.

Q. What are your reasons for going with one film

company only?

A. My reasons are that I didn't want my screen cluttered up with everybody's ad, and I wanted them to run harmoniously. I didn't want this type of film that S & M sells. It is hard for me to explain the difference between the S & M ad and United Film ad. In other words, one is a talkie and the other is more or less a silent affair. They will show some baby chicks

for a produce house and put the person's name underneath and it is on and it is off. With

United Film, they run for 40 or 50 seconds and they give what you pay for.

Q. Now, Mr. Arndt, you were present when the other two gentlemen, Mr. Blank and Mr. Branton, testified?

A. I was.

Q. And you, I take it, are an individual theater operator as distinguished from those two gentlemen who are the general managers of theater chains. What is the fundamental, underlying reason why you have film

advertising?

A. To make money. My revenue on my film advertising will amount to approximately \$500 a year. That is the main reason that I have advertising. The second reason is that I think it is good advertising for the local people that patronize your show—if you don't have too many ads. Another reason is that people look for ads to a certain extent when they go into a theater, and I believe that every theater should at least advertise 3 or 4 or 5 minutes per show.

Q. Are you of the opinion, Mr. Arndt, that there is a certain maximum advertising time that a theater

can show upon its screens?

A. Absolutely.

Q. In other words, that there is a limited space?

A. Absolutely. If you have too many ads, it takes too much of your running time.

Q. What is the result if you have too many

[767] ads; what happens?

A. Well, yeu are filling your house, and just as Mr. Blank stated, he runs five shows a day and 5

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minutes for each show is 25 minutes a day. I don't run five shows because I am not in that kind of a situation, but I aim to run 5 minutes of ads per show and two shows in the evening gives me 10 minutes of ads.

Q. Would you get any adverse audience reaction if

you ran too many ads?

I believe you would, yes, because people do not like to sit through too much advertising.

Q. The income which you received for the showing of the S & M films was, I believe you stated, \$10.

A. \$10.

· Q. Have you ever received any more?

A. No, sir.

Has your income from film advertising exceeded \$10 since your relationship with United Film Ad Service?

Oh, yes, yes.

Q. In other words, you are principally in the business. for the money, you show film ads for the money derived from the showing of film ads?
A. That is correct.

And your experience has been with one film advertising company that it means more revenue to you? A. Absolutely.

[768] Mr. Cozad: I believe that is all.

775 RALPH S. PRYCE was thereupon called as witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

(By Mr. BURGESS:) Will you state your full name?

A. Ralph S. Pryce.

.Q. In what business are you engaged, Mr. Pryce?

A. Salesman.

- Q. For whom?
- Alexander Film Co.
- How long have you been engaged in selling for the Alexander Film Co.

Six years.

Q. It is part of your duties as salesman to contact both theaters and prospective advertisers?

A. It is.

[776] Q. What territory do you cover?

A. Western Iowa and special accounts from Omaha.

[779] Q. When you sign up theatres for contracts, do you attempt to obtain an exclusive agreement with them?

A. Yes, sir, always.

Q. From your experience as a salesman will you state, what your reasons are for attempting to obtain exclusive contracts?

Mr. Collins: I will object to that, Mr. Examiner. Trial Examiner Kolb: The objection will be overruled.

Mr. Burgess: You may answer.

A. There are really a great many reasons, I probably won't think of all of them, why a salesman desires very much to have exclusive or non-competitive screen rights, for the reason that you may offer and practically guar-

antee protection to the advertisers when you sell them a contract for advertising on the theater

screens so that you can avoid placing competitors on the screen the same weeks, and by reason of having exclusive rights on the theater's screen you can keep your advertisers much better satisfied. In fact, in my instance I'm sure it has made it possible for me to continue to renew my advertisers year after year and helped a great deal in building up this territory to where I have now got it developed. Most advertisers want to feel that they have exclusiveness, and they admit when they sign up that that is what gives the screen—

Mr. Collins: Mr. Examiner, I want to object to that. Trial Examiner Koll: Limit your answer to your experience, your reasons why you have endeavored to ob-

tain exclusive contracts.

A. It gives me more selling points, more selling pressure; more value to offer the advertisers; I'm able to render better service to the theater owner; I have been able to pay better for screen rentals; it makes advertis-

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ing worth more money to the advertiser.

Q. (By Mr. Burgess:) Do you have theater contracts which are constantly coming up for renewal?

A. Yes.

Q. That is, some of your theaters throughout the territory, the contract is expiring regularly?

A. Yes, I have contracts for a limited time

[781] only.

Q. When the renewal dates of those contracts are coming up, do you find that there is or there is not competition in retaining that theater?

Mr. COLLINS: I am going to object to that.

Trial Examiner Kolb: The objection will be overruled.

A. Yes, we are proceeding and offering more money for rights on the theater screens constantly.

Q. (By Mr. Burgess:) What are the elements which you have to overcome in order to obtain a renewal of

your theater contracts in competition?

A. First the theater owner has to be satisfied he is receiving what he thinks his screen is worth to him. He has to feel you're able to place the number of advertisers on his theater screen that is requisite or possible to make it worthwhile to him to have any advertising service on the screen at all, and it is very necessary to obtain the friendly feelings of your theater owner to secure cooperation in retaining and in securing the full number of advertisers needed.

Q. In other words, the price that you pay to the theater on the amount of business you think you are going to be able to do with him is an important factor?

A. Very important.

Mr. Burgess: I think that's all.

[782] CROSS EXAMINATION

Q. (By Mr. COLLINS:) Mr. Pryce, do you have any other competitors than the S & M Company?

Q. Will you name some of the other competitors you have in this field?

A. Reed H. Ray, United, and S & M.

Q. Now, have you in your experience ever been able

to secure a contract with a theater which had previously had a contract with the Reed H. Ray Company?

A. Yes.

Q. Have you ever been able to secure a contract with the theater that was doing business with any of the others?

A. Yes.

Q. Would you name some of the others, some of the other concerns that you have been able to obtain a contract with the theaters with which they were doing business?

A. United—You mean contracts with the theaters for placing ads on the theater screen?

Q. Yes.

A. I have taken theaters away from all three of them.

Q. You have taken them away from all three of them?

A. That's right.

Q. Have you lost any?

[783] A. What?

Well, one, that was for other reasons than the

quality of the film, or the quality of the service.

Q. Now, Mr. Pryce, you spoke about your advertising customers, do you yourself contact the advertising customers, that is the stores?

A. Yes.

Q. And you make arrangements with the stores then for showing their ads on the screen?

A. That's right.

Q. Now, Mr. Pryce, could you tell us the approximate length of the contract which you have with the different advertisers, over what term?

A. You mean the period of time?

Q. Yes.

A. One year.

Q. And that is generally the length of contract then that you make with the different advertisers?

A. That's the one we try to make every time, once in a while we have what you call a short term, three months, 13 weeks.

Q. 13 weeks?

A. Yes.

Q. But generally they are for a 12-month period?

A. That's right.

[786]

REDIRECT EXAMINATION

Q. (By Mr. Burgess:) You stated on cross-examination that most of your advertising contracts are for a period of one year?

A. Yes.

Q. Now, when you sign up advertisers for the use of any one particular theater screen, those advertising contracts don't all start at one time and end at one time, do they, for your various advertisers.

A. No, they are scattered throughout the year.

Q. So that you may have one starting in January and another advertising starting his year in February and another one in July?

A. That's right.

Mr. Burgess: That's all.

Trial Examiner Kolb: Any further questions?

Mr. COLLINS: Nothing further.

[787] Q. (By Trial Examiner Kolb:) You stated the contracts were for a limited time, with reference to theaters, what is the length of time of the contract with theaters for screening rights?

A. We usually try to get them for three years, some-

times they run for less.

Q. What percentage would run for three years, and

what for less and what is the less period?

A. That would be a very difficult thing to answer, I would have to guess at the answer. I would say 85% of the contracts I have obtained run over a period of three years. Some run for one year, with the option of two more years written into it, mainly protecting themselves on the rate of rental they can obtain for the use of the screen. That is the object, usually.

Trial Examiner KOLB: That's all.

Q. (By Mr. BURGESS:) You use a regular printed

form of contract for these agreements?

A. Oh, yes.

Q. That contains the three-year clause?

A. That's right, it's a regular form.

Q. There isn't in very many of those in your territory that you change the term of it as stated in the printed form?

A. That's right, the only thing I mentioned, if they think they may be able to get more money for the screen next year or something they didn't want

[788] to sign up for that period of time. The money item is a very important little item in obtaining contracts.

Mr. Burgess: That's all.

ARTHUR H. SUNDE was thereupon called as a witness for the Respondent and, having been first duly sworm testified as follows:

DIRECT EXAMINATION

- Q. (By Mr. BURGESS:) Will you state your full name?
 - A. Arthur M. Sunde.
 - Q. That is S-u-n-d-e?

A. That's right.

Q. In what business are you engaged, Mr. Sunde?

Q. And where?

A. Papillion, Nebraska.

Q. You operate that theater yourself at the present time?

A. Yes, sir.

Q. How long have you been at Papillion?

A. We opened August 5 of this year.

Q. Have you been in the theater business in other places prior to opening the theater in Papillion?

A. Two other places.

Q. Where were they?

A. First at Woodward, Iowa, and second at Elma, Iowa.

Q. How long were you at Woodward?

A. About 16 months.

Q. And how long were you at Elma?

A. Eight years.

Q. And were you the operator or manager of the theater at each of those places?

A. That's right.

Q. Do you show screen advertising on the screens of your theater?

A. Yes, sir.

Q. (With what advertising film company do you do business?

A. Alexander Film Company.

Q. Do you place a limitation as to the number of ads which shall be shown on the screens of your theater?

A. Yes.

Q. That is included in your contract with the Alexander Film Company?

A. That was understood, that there would be a limit:

Q. What is the limitation you place as to the number of ads?

A. Four weekly.

Q. Have you ever been approached by Mr. Meyer of S & M Service or any of his salesmen?

A. Yes, I was approached by Mr. Meyer and one of his salesmen, too.

Q. Was that since you opened your theater at Papil-

A. No, it was both—I'm not sure about the salesman but Mr. Meyer was out some time before I opened, quite a while before I opened.

Q. Did he ask you for the right to show his advertising film on your screens?

A. Yes.

Q. When he was first out there had you contracted with any one for the showing of advertising film?

A. I hadn't contracted, however, I had promised Alexander Film Company's salesman we would keep the screen open for him.

Q. Did you have a conversation with Mr. Meyer at that time about his advertising film?

A. Yes.

Q. Can you state what the substance of that conversation was?

A. Well, he just tried to convince me he could go out and sell a lot of advertising in the town and I told him I wasn't interested in seeing how many ads we could sell in the town. I told him I didn't think I would care for that type of preview or that type of trailer on our screen. He tried to persuade me to go to Bellevue where he had sold and look at some of their trailers. I never

went over, I wasn't interested. He wanted me

[791] to think it over and he was coming back to see me. The salesman did come back and I told him about the same thing, that I didn't care for that type of trailer.

[792] Q. (By Mr. Burgess:) Mr. Sunde, from your experience as a theater operator, what elements do you take into consideration in granting the screening

rights to advertising film companies?

A. I feel it is quite necessary to have control of your screen, as to the kind of advertising and the amount of advertising you put on it, both from the standpoint of the satisfaction of the advertisers, and to your audience. I feel that there will be less criticism from the audience if you show them a good quality advertising trailer, and I feel when I granted the right to Alexander to sell film we were selecting what we believed, at least, was the best in the field.

Q. Is the regulation of the type of advertising shown on the screen an element which you take into consider-

ation?

A. Will you read that, please?

(Question read.)

A. Yes, it is.

Q. Would you be interested in doing business with more than one screen advertising company at a time in your theater?

Mr. Collins: I object to that.

Trial Examiner Kolb: The objection will be overruled.

A. No, I wouldn't consider doing business with more

than one.

Q. (By Mr. Burgess:) Will you state why [793] you wouldn't?

A. Well, there would be too much danger of

conflict, doubling up an over-crowding.

Q. Will you explain what you mean by that?

A. I mean if we had two or three salesmen coming into town and selling, we would have two or three filling stations advertising one week and possibly the next week we wouldn't have any. We like to control that so we don't have more than one business of a kind on the screen at one time, that's our main reason for limiting the number show at one time.

Q. All right, what other reason do you have, if any?

A. That's about the only reason, the principal reason, at least.

[798] CLARENCE T. RICE was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Cozad:) Will you state your name, Mr. Rice, please?

A. Clarence T. Rice.

Q. Where do you live?

A. 934 Barnett Avenue, Kansas City, Kansas.

In what business are you engaged, Mr. Rice?

A. Savings and Loan business.

Q. What is the name of your company?

A. Anchor Savings and Loan.

Q. Where is it located?

A. 731 Minnesota, Kansas City, Kansas.

[799] Q. What is your title?

A. President, and founder of it.

Q. How long have you been so engaged in that business?

A. Twenty-five years.

Q. Always in Kansas City, Kansas? A. Always in Kansas City, Kansas. Q. Mr. Rice, do you advertise?

A. Yes.

Q. Do you use film advertising?

A. Yes.

Q. Do you presently have a contract with the United Film Service, Inc. for film advertising?

A. Yes, sir.

Q. What is the length of your various contracts for film advertising with United?

A. Fifty-two weeks.

Q. Your contract provides, I presume, Mr. Rice, for the display of a film which you have selected during a given period at given or designated theaters?

A. That is right.

Q. Would you enter into an advertising contract, Mr. Rice, for film, advertising if you did not know at the time you entered into this film advertising contract that theaters and at what times your advertising film would be shown?

[800] A. No, sir.

PAUL L. WILSON, JR. was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. CozAD:) Will you state your name, Mr. Wilson, please?

A. Paul L. Wilson, Jr.

Q. Where do you live, Mr. Wilson?

A. 4610 West 69th, Mission, Kansas.

Q. What business are you engaged in?
A. In the dress manufacturing business.

Q. What is the name of the company?

A. Gernes Garment Company.

Q. Where is that company located?

A. 2617 Grand Avenue.

Q. In what city?

A. Kansas City, Missouri.

Q. What is your title with the Gernes Garment Company?

A. Vice-President.

Q. Mr. Wilson, as Vice-President of the [801] Gernes Garment Company, do you have charge of the advertising for the company?

A. Yes, I do.

Q. What is the product that you manufacture?

A. Junior dresses.

- Q. Do you have various stores throughout the state of Missouri and other states that handle your particular line of dresses?
 - A. Yes. We sell one store in town.

Q. Do you have a trade name?

A. Gay Gibson is the trade mark.

Q. Does the Gernes Garment Company advertise its product, Mr. Wilson?

A. Yes, it does.

Q. By what media?

A. Well, with fashion magazines, direct mail, movie advertising, mats for newspapers.

Q. Explain what you mean by movie advertising. I mean by that, explain whether you purchase the film and show the film under your name or whether you purchase the film and have a dealer arrangement.

A. These films are produced for us and we supervise the production, and the distribution is handled by the film company, thirteen playlets a year, and those garments, of course, are divided into a certain number of series of films.

Q. Does the contract for those films also provide for the showing of those films at various localities and various theaters?

[802] A. Yes, it does.

Q. Do you make the arrangement directly or do your dealers have anything to do with the arrangement for the showing of the films?

A. The dealers make the arrangement for the show-

ing?

Q. Is this movie program known as a manufacturerdealer program?

A. You mean we sell them and they in turn adver-

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A. By that I mean, Mr. Wilson, that you, for Gernes Garment Company, arrange for the production of the advertising films which you make available to your dealers and your dealers in turn make arrangements for the showing of those films in those theaters?

A. That is correct.

Q. Does the Gernes Carment Company pay the entire cost of production of those films?

A. Yes, we pay the entire cost.

Q. And the making of the prints for the distribution among your dealers?

A. Yes.

Q. How many states do you have dealers in?

A. All states but the New England states.

Q. Do you offer to make this advertising [803] film available to all of your dealers?

A. Yes, we do.

Q. State whether or not, Mr. Wilson, it is of any importance to you as a manufacturer, in entering into a movie advertising program, that you are assured of the availability of screen space throughout a wide area?

A. Well, that aspect of the program is very important. The production of the films is rather expensive and is part of our advertising budget. If course, we couldn't enter into an advertising contract unless we were assured of a potential market and that market would be services, and these films, once produced, would be distributed at one time.

Q: State, Mr. Wilson, whether or not these playlets are grouped to correspond with the particular models that you place in the hands of your dealers during eer-

tain seasons of the year.

A. For example, we have five lines of the year, one of which would be the first spring line which might have fifty dresses in it, and we will manufacture and ship those dresses directly to the stores that are going to sell them. We have three playlets to correspond to this one first spring line. Those films must be shipped and shown in those theaters at the same time we are shipping the first spring line.

Q. In other words, I take it then, that, unless you

could be assured of a wide showing throughout your entire territory of a given number of these playlets, film advertising would be of little or no value to you.

A. That is correct. F8041

State whether or not, Mr. Wilson, it is of any importance in determining whether to spend any part of your advertising budget on film advertising long in advance and to be able to advise your dealer as to what the cost of display of the various films would be.

A. Naturally our dealers are very interested. When movie advertising is discussed we have to know the approximate cost, and in most cases they want to know the exact cost or at least the rate per thousand in a certain movie theater in their town, and occasionally they want it in all theaters or part of the theaters.

What period of time do you contemplate to cover the showing of these thirteen playlets?

They are to be shown throughout the period of

one year.

State whether or not it is then essential that you know at the time of entering into a contract with a film advertising distributor that those thirteen playlets will be shown at definite dates in definite localities throughout the entire year.

A. That is very correct.

And it is likewise essential that you know in advance and may be able to advise your dealer the cost of showing?

That is true:

Q. Does the Gernes Garment Company pay-[805] for the entire cost of production?

We pay for the entire cost of production,

Q.

yes.

- Do you pay any portion of the cost of the display? No.
- Q. It is entirely borne by the dealer?

It is entirely borne by the dealer. That has been

a policy of ours for a long time.

Q. Mr. Wilson, is the Gernes Garment Company presently engaged in a movie contract with United Films Ad Service, Inc.?

A. Yes, it is.

Q. How do you assure yourself or assure the Gernes Garment Company that the films, which you would pay for the production of in the making of the prints, would be available for display throughout the entire United States with the exception of the New England States?

A. The United Films Ad Service Company, when we first discussed this, assured us there was space in most of those theaters, that they would attempt to sell this group of movie playlets, distribute them for us and service our accounts, in such a degree we felt we were assured of going ahead with the program and it would be beneficial to both our accounts and to us.

Mr. Cozad: I believe that is all..

CROSS EXAMINATION

Q. (By Mr. Collins:) Did you make ar[806] rangements with United for the showing of those films for the particular dealers, or did you leave that up to the dealers?

A. If I understand your question correctly, naturally our dealers had to be sold on it first. Since we were not paying any of the cost in the theater, they would have to see their way clear to exhibit movie advertising once they accepted it, and then it was contracted for.

Q. Did the dealers know at the time they were accepting this the number of theaters and places where the advertising would be shown?

A. & Yes, they did.

Q. And that was true within all localities?

A. So far as I know it was, yes, sir. .

Q. And from whom did you get the assurance where these different theaters were located.

A. From my discussions with representatives of the United Film Ad Service.

Q. Did United tell you the cost of the display at the time you were discussing this?

A. They gave us estimates which would be applied to most theaters in the United States, as I understand:

Q. And was that in all localities?

A. Yes, sir. °

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- Q. And did United tell you, at the time you entered into this agreement with United; just what space was available I mean in period of time. Were they able to tell you the months in which the space would be available?
- A. They were able to tell us, in lining this program out, that the screen space was available in practically all localities and that our program would be serviced to our accounts by their sales organization and the distribution would be handled by them, as it has been.
- Q. And that their sales organization would attend, of course, to the selling of your distributors?

A. That is correct.

- Q. So the extent, then, of your understanding or agreement with United was for the production of the films?
- A. The production and distribution of the films, of which the distribution is a very important part.
- Q. Didn't you leave the distribution up to your dealers?
- A. We left the acceptance up to our dealers. Our sales organization was selling this series of films and, of course, the contract was signed by the sales organization or members of the sales organization of United Film, who are our dealers.
- Q And you had to know from your dealers the number that would be interested in the advertising before you had the films produced?

A. Yes, we did.

- Q. Now, you didn't have a different film produced for different localities, did you?
- A. No, we had the same series of films pro-
- Q. So that the films shown here would also be shown in Virginia, Louisiana, Florida and Colorado?
- A. There would be three films shown over a period of two and one-half months; the films shown in the Kansas City theater might not be the same film shown in Lincoln.
- Q. But eventually the film shown in Kansas City

would be shown in Lincoln, and the film shown in Lincoln would be shown in Kansas City?

A. That is right.

Q. But it is not necessary they be run at the same time?

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A. No, except that the schedule is quite complicated

in order to tie in with our shipping schedule.

Q. For what period of time does your contract with United run?

A. It runs a yearly contract, twelve months.

Q. How long have you had a contract with United?

A. One year.

Mr. COLLINS: I believe that is all.

REDIRECT EXAMINATION

Q. (By Mr. Cozad:) Just one more question, Mr. Wilson. Would you have any objection to stating, if you know offhand, about what the cost is to the Gernes Garment Company for the production of the thirteen

playlets plus the making of the prints for the

[809] various dealers?

A. I can give you a yearly figure and that runs a ound \$10,000. Naturally, in the succeeding years when more accounts are under contract, that cost will rise proportionately.

Mr. Cozad: I believe that is all.

RECROSS EXAMINATION

[810] Q. (By Mr. Collins:) Now, Mr. Wilson, in the dress manufacturing field the style changes from season to season, does it not?

A. That is correct.

Q. And for that reason, when you are trying to convey to the public certain styles, it is necessary for you to change the photographs of those dresses from season to season, is it not? That is, when the style changes you have to change photographs?

A. In other words, we have five lines and we may have films to tie in with those dresses, a seasonable

set-up.

Q. And your method of advertising is to show the

public exactly how the garment will look when purchased, is that right?

A. That is part of the results we hope to

gain with the program.

And, of course, as you say, that changes from season to season?

A. That is correct.

REDIRECT EXAMINATION

(By Mr. Cozad:) These are all live-action films or playlets?

A. Yes, sir, with sound.

Mr. Cozad: That is all.

Q. (By Trial Examiner Kolb:) Mr. Wilson, on cross examination you stated that you had a contract with United for one year. Do you mean that your contract was for a period of one year, or you have done business with them only for one year?

We signed our first contract-I don't remember the exact date of it-for thirteen playlets and, of course, thirteen playlets to us, as broken up in our manufactur-

ing year, is one year.

JOHN G. TURNER was thereupon called as a [814] witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Will you state your full (By Mr. BURGESS:) name?

A. My name is John G. Turner.

In what business are you engaged? Q.

A. Advertising agency.

How long have you been engaged in the advertising business?

Nearly 16 years, 16 years next January.

Where is your principal place of business?

A. At Chicago, Illinois, 520 North Michigan 815] Avenue.

In connection with your advertising business, Twe you used film advertising?

Yes, sir, we have.

Q. Over how long a period of time have you used film advertising to some extent?

A. We have used t over a period of 14 years.

Q. Could you state approximately how much business you have done in dallars in film advertising during the past 14 years.

A. Oh, I would estimate the figure at about one

million dollars:

Q. When you first started using film advertising,

will you state how you conducted that business?

A. When we first started to use film advertising, we arranged for a local filmer or producer of films to make up a playlet, as we called it, and that was done after we had secured an order from a client to arrange for a campaign in whatever territory we thought we could get for theatre coverage.

We would then take these films, and on the direction of the client, we would attempt to contact theatres to get the film shown at a certain theatre within perhaps a period of a month or two leeway, and our attempts on this basis were carried on with some variations.

We found that that method wasn't very successful, due to the fact that the contacting of the theatre was by mail, and when we would write to a hundred thea-

tres we would have replies perhaps only from

varied this procedure somewhat by having the salesmen of the client go around and call on theatres. We made a little bit more success with that than we did with the mail method, but that again was unsuccessful on the whole, due to the fact that the salesman that went around was employed by the manufacturer and was not fully apprised of all the factors involved in the situation, and we found that the amount of orders or the amount of business placed on the screen for our client was of rather meager nature.

[823] Q. Go ahead.

A. When you are dealing with newspapers and magazines you know exactly what the publishing schedule is, and you give no thought whatsoever to the

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fact that your investment in making up a set of plates which is going to run in that magazine or newspaper is

not going to produce what the person ordered.

In the case of screen advertising, we have had the experience of making up a film, or a series of films for the advertiser, and have gotten a very, very poor return due to the fact that we could not make physical use of it, in the results of getting the film shown.

Now when we have a client sold on the use of screen advertising it involves an expenditure of sev-

[824] eral thousand dollars, and he has to have some assurance that these films will be run to the extent of the amount of money that he has put into these, so we have to show him, we have to convince him that the film company we are dealing with has the facilities for running those films in these various areas, and the experience that we have had with this medium has,—the way we are working it now, we have never had any let-down and had as high as thirty or forty thousand dollars invested for a client in the mechanical part of the film business, in other words, his own playlet that he has to have made up in order to carry on his campaign.

Q. Do I understand that the client, the advertiser,

has the films and prints made up at his own cost?

A. Yes, he does.

Q. And after having gone into that, it is necessary for him to be able to have those shown in order to get any benefit from them?

. A. That is correct.

Q. At the present time who makes up the film fore your advertisers?

A. At the present time Alexander Film Company.

Q. And your customer pays the cost of the production of the film and the prints?

A. That is right.

Q. And the prints are made up according to the number that may be ordered by the customer for his use, is that right?

A. That is right.

Q. Now, who pays for the display of the film on the theatre screens?

A. The display of the film on the theatre screen is paid for by the dealer, manufacturer, in part, by the distributor, who is the middle man between the manufacturer and dealer, in part, and by the manufacturer in part.

Q. So that the cost of screening is paid partially by the distributor in each community and partially by the

manufacturer?

A. Yes, sir.

Trial Examiner Kolb: Who do you mean by the distributor, distributor of the manufacturer or of the film?

The WITNESS: Of the manufacturer.

Q. . (By Mr. BURGESS:) That is the local dealer of the product?

A. Well, there is a distributor of the product and a

local dealer involved in most cases.

Q. Have you had occasion in recent years, Mr. Turner, to have film produced and prints produced by others, than Alexander, and have them distributed through Alexander?

A. Yes, we have.

Q. Have you had any difficulty with Alexander in obtaining such distribution?

A. No, we have not.

of the film, do you make any arrangement that non-competitive ads are on the screen during the same period of time as your customer's ad is being shown?

A. We wouldn't go into the medium at all if we didn't have some assurance, verbally or otherwise, that there would be an attempt made to keep a competing ad off. It would be rather ridiculous to have four ads on a screen or even two who sold paints or shoes or who sold some other type of a product. Our advertisers prefer to have their message on the screen at the time advertising is being shown to be the sole product of that nature, and we have that thing, it is arranged in such as way that we have no complaints about it.

Q. You do have the arrangement with Alexander in the handling of your film that there will be no competing ad during the time your advertising film is being run?

A. That is right.

Q. And I think you said you would not be interested in running film advertising if there was to be competing ads?

A. No, we wouldn't, that is right.

Q. Have your advertising campaigns, with the use of films, been successful since the time you started dealing with Alexander?

A. They have been very successful.

Q. Have your customers been satisfied with [827] the products and the service?

A. Yes.

[828] Q. After you have selected your theatres, Mr. Turner, is there a lapse of time between that

selection and the process of releasing the film?

A. Yes, there is a considerable lapse of time. There is a normal lapse of time, of getting a decision on the program, and then there is a lapse of time of making up the required playlet that we are going to show to the

movie houses. Sometimes that takes anywhere from sixty days to six months to complete the productions.

Q. They are made up specially for you?

A. They are in each case, and previous to that time we may have to spend a little time in research in order to determine the exact type of presentation that we make with the theatres.

And then, after we have decided on this, there is a lapse of time involved in it, our clients are contacted, and their distributors, who more or less have to fit that plan in with their own expenditure, for the period, or for the coming period, whichever it is going to be, and they, in turn, must be contacted by the salesman of the Alexander Film Company, and be given a listing of the dealers, that could be called on with a rating as to the amount of money, the maximum amount of money that the order could be done with, with the dealer, and from that point on, there is the showing of the film after the order has been secured from the dealer, and has to

be sent to the distributor again for his approval, which may take a couple of weeks.

Then it usually takes about five weeks before the actual screening goes on,—five weeks time which fits in with the program of getting the screenings to take place over a uniform period of time.

From that time on we forget about the thing because the screening is taking place on a frequency basis, whatever the dealer and salesman had worked out to his advantage.

[830] Q. Now, how many playlets are customarily set up for one of your programs for the client?

A. Well, customarily we set it up on a basis of thirteen. That is done because we have to allow for the man who wants to run a playlet each week, or for the man who wants to run it less frequently, but unless we have thirteen, we don't have any variety of playlets to show on the screen. In one case here we are using, I think, twenty-one, because the subject matter dictates that, when there is a choice, but there has to be enough frequency, enough different subjects so as to carry on some kind of an even campaign.

Q. About how long would you say it is from the time your customer decides on a film advertising campaign until that screening of the film ordinarily begins?

A: You mean the manufacturer, or the client?

Q. Yes.

A. Well, when he decides to make that film up he may decide it should just begin when he decides,—if he should decide at the tail end of a selling period, for instance, if the selling period is heavy in the spring, and we should happen to get his decision on it after it is over, that campaign may of course not be set up to screen until the following March.

But if he should wish to get into the campaign very

quickly,-is that what you had in mind?

Q. Yes.

[831] A. Very likely then we can work the thing out, so that it will probably take, well, you have got that period of around two months to six months to get the production. I would say we would hurry it

along, it would still take four to five months before he

would actually have anything run on the screen.

Q. During that original lapse of time, however, the customer has selected the theatre and you must know what the cost of the theatre to the customer is going to be?

A. That is right.

Q. Then how long a period of time does your screen-

ing campaign ordinarily cover?

A. Well, we hope to have it cover as long a period of time as we can: Our goal is to have the dealer run that film every week straight through for a continuous period. In other words, the way it does happen is, we have about, I would say, maybe fifty per cent of the dealers run each week for the period of one year, due to the fact that the contracts are signed, I believe, for the period of a year, the most contracts are of that period, the signing of that for a man who wants to run his advertising,—it will take the period of a year.

Q. Now, ordinarily on your manufacturer-dealer arrangement which you handle, does your original setup

also call for a follow-up campaign?

A. It does. If it doesn't call for a follow-up campaign, it is because the campaign has been

a failure. That is applied to anything. In other words, we have carried this campaign for year after year, because we find they improve business to the dealers as they are carried on. When a dealer is running these films he seldom quits.

Q. And your follow-up campaign would be for the same manufacturer-dealer over another period of a year?

A. That is correct.

[842] MARC J. WOLF was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

- Q. (By Mr. Cozad:) Will you please state your
 - A. Marc J. Wolf.
 - Q. Where do you live?

A. Indianapolis, Indiana.

Q. In what business are you engaged?

A. Operation of theatres.

Q. Is that operation conducted individually or through your corporate setup?

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A. Our company is the Y and W-Corporation.

Q. Do you have a number of theatres in that territory?

A. We have twenty-seven theatres.

Q. Do any of your theatres do film advertising?

A. Seventeen of the twenty-seven use film advertising.

ing.

- Q. Are you presently under contract with United Film Service in connection with your film advertising?

 A. We are.
- [843] Q. How long have you done business with the United Film Service Company?

A. I believe this is the eighth or ninth year.

Q. Have you determined in the operation of your theatres, Mr. Wolf, that there is a saturation point beyond which it is uneconomic to go in the screening of film advertising?

A. In my opinion you run into a certain amount of audience reaction which is bad if you have too many

ads on the screen at one time.

Q. In your particular theatres where you show film advertising, what, as a general rule, is the number of film ads that you limit during each performance?

A. Always to a maximum of four ads in one showing.

Q. Do you know approximately what four ads would constitute in minutes, length of time that it would take to show four ads?

A. Around two minutes time, two or two minutes

and a half.

Q. What is the paramount reason for having film advertising?

A. There is just one reason, that is the revenue it

produces.

Q. In other words, it constitutes in and supplements the revenue which you would receive in the running of a motion picture theatre?

A. That is correct.
Q. Have you in the past done business with more than one film advertising distributor?

A. Quite some years ago we did business with

more than one, yes, sir.

Q. With how many advertising film distributers did you do business?

A. Two.

Q. You are doing business with only one advertising distributor at the present time?

A. That is right.

Q. What are your reasons for doing business with only one advertising distributor?

Mr. Collins: Mr. Examiner, I want to object to this line of testimony as not being material to the issues in the case.

Trial Examiner KOLB: The objection will be overruled.

A. My reason for wanting to do business with only one advertiser is because it makes the job of keeping track of the revenue you have coming to you much more simple to do business with one concern only, and then there was another reason which prompted us to do business with one advertiser alone, and that was the fact that we didn't want to at one time have more than four ads on our screen, and with more than one sales . force advertising for a particular screen, we found we very often ran into a spot where they had sold, between the two of them, more than four ads, and then it became necessary for us to omit one or two ads, as the

case might be, from one or the other of the two

advertising concerns.

We found that that was distasteful not only to the concerns that had gone out and sold the advertising, but it made for bad feeling from the advertiser himself, who wondered why his ad was omitted while some other ad was run, and it seemed impossible to keep track of the exact dating of various sales, with the result that as I said before, very often we had more than four ads scheduled for screening at one time. doesn't happen with only one advertiser handling it, only one advertising agency handling the advertising,

because they know that no more than four should be scheduled at one time.

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Q. I take it from your testimony then, Mr. Wolf, that irrespective of the form of contract which you had with the film advertising distributor that you would do business with only one film distributor at one time?

A. That is right.

Mr. Cozan: I believe that is all.

Trial Examiner Kolb: You may cross examine.

CROSS EXAMINATION

Q. (By Mr. Collins:) Mr. Wolf, do you recall taving been interviewed by Mr. Van Waggoner, a representative of the Federal Trade Commission on May 22, 1945?

A. No, I don't. If you could tell me a little bit about

what it was, possibly I could remember.

[846] Q. Well, it was about the screen advertising business. Do you recall having been interviewed by any representative of the Federal Trade Commission at any time?

A. Yes, the name didn't mean anything that your first mentioned. I remember having someone ask me from the Commission if we had an exclusive screen ad contract. I think this was the total extent of it, and I told him we did.

Q. And there has only been one party who has interviewed you,—a representative of the Commission?

A. That is correct.

Q. Now, do you recall having stated to the man who interviewed you that it was because of Mr. Hendren that you carried the advertising—

A. I don't recall having said that, but that is true.

If I was asked that I would have said so, yes.

Q. And do you recall having stated to him, to this representative, on that occasion that it r as only because of this friendship with Mr. Hendren that you carried screen advertising at all?

A. Sir, I can't recall the exact conversation. I doubt if I said that because before I knew Mr. Hendren we had screen advertising. I probably said that screen ad-

vertising was not of great importance to us. It was simply a side line by which we acquired some revenue, But I don't remember the exact statement.

Q. Now, I believe you stated as one of your reasons for limiting your screen advertising business to one distributor was the question of keeping up with the number of ads and the time of showing the different ads.

A. Mainly not so much keeping up, but not exceed-

ing the maximum of four at one time.

Q. Well, Mr. Wolf, would it not be possible for you to inform the representative who was out contacting the advertiser how much space you had available on your

screening?

A. That is a little bit hard to do,—if you will allow me to elaborate a little bit. You see, screen advertising is sold on various types of deals. Some fellows sell an ad that runs once a week or once a month. Some sell ads that run once every two months, and there are a number of different types of contracts sold, and unless we kept a complete bookkeeping system and exchanged these contracts with the other companies constantly, it is almost impossible to avoid conflicts. One salesman doesn't know what the other one sold, and it winds up two or three times a year with more than four ads sold, possibly two or three for that particular week, and all of a sudden we wake up and there would be six ads, and that meant more trouble, not only for us. but for the salesman as far as his advertising was concerned.

Q. Mr. Wolf, at the time you were doing business with more than one distributor, when the distributor would sell an advertiser, wouldn't he inform you of the duration of the contract he had with the advertiser?

A. Oh, yes, when a deal is sold, we are all notified that they have consummate a contract and so forth, with the terms, but getting back to the reason for limiting us to only one concern, it is so much easier if you don't have to worry about two people selling, to know those ads are coming from one source, knowing that you have limited your screen to for ads at one time, you never

will have to worry about being oversold, and you don't have to worry about keeping books. You have a definite setup. You know when they come in and see what ads ran and what ads didn't run, and inasmuch as screen advertising itself is just a side line, not of any major importance, we try to do it the easy way. It is much more simple from our standpoint to have the one source.

Q. And at the present time then, you don't have to

keep any track of the number of films?

A. We don't have to do anything at all in our present setup except to tell our manager that we don't run over four ads which they were told years ago, and sit back and get our payments from the one source when it is due.

Q. You don't even have to tell your manager that

under your contract?

A. Wouldn't have to, no.

Q. And you just sit back and you are paid [849] for four ads whether the ads are run or not,

are you not?

A. No, I don't think that is exactly right. Our basis of payment is calculated on the average number of the ad which is run. I doubt if it is based on the maximum, but it is possible to guarantee the maximum at all times. We would rather take a flat settlement without any of the details that go with the other setup.

Q. You get a stipulated amount whether there are four ads run or whether or not there are two ads run?

A. That is correct.

Q. And that amount does not vary?

A. That is right.

Q. And if you didn't run any ad, you would still get that monthly payment, would you not?

A. That is right.

Q. Now, it is possible, is it not, for the distributor to keep up with the number of ads running on your screen, is it not?

A. You mean for the man who is selling the ads to

know how many of them are sold?

Q. You have a contract with the United, do you not?

A. Yes, sir.

Q. And United keeps up with the number of ads

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shown on your screen, does it not?

A. Yes, sir.

[850] And the length of time? Q.

. A. They all run for the same time.

Q. You say all run about the same length of time?

That is right.

Q. What length of time is that?

A. Between thirty and forty-five seconds.

What I am speaking about is the number of weeks a certain advertisement would be run? How many weeks

would you say is the average length of time?

A. Well, that is a little hard to answer. I have seen contracts that called for showing in twelve consecutive weeks, and I have seen contracts that called for showing once a week, or once a month or every other month, it all depends on what they could sell to their client.

And you are not in a position then to generalize

on that?

A. No, sir, the only thing we are interested in is to. see there are not more than four at one time.

Q. Mr. Wolf, why do you limit the number of ads to four?

A. In my opinion, people have paid to come to a theatre for entertainment and they resent to a certain extent being subjected to advertising. But if you limit the amount of advertising to a short number of minutes, they become used to it and don't object to it very much, but if you run a lot of ads, which some people do, in my opinion, you are going to lose customers because

they resent being forced to sit and look over a [851] certain amount of advertising, so we have hit on the number of four as being the saturation

point.

Q. Without having the patrons resent it?
A. We are doing that for a number of years.

Q. You figure then that four ads is the extent of punishment that the public will have to pay for the purpose of going to picture shows?

A. That's about it, yes.

Q. How long did you say that you had been dealing with United exclusively?

A. I am not exactly positive, but it is eight or nine

years.

Q. Now, Mr. Wolf, if some other distributor should approach you with reference to displaying advertising films on your screen, what would you do?

A. I would tell him that he couldn't use his ad on

my screen.

Q. You wouldn't show his ad on your screen?

A. Not at the present time, no.

Mr. Collins: I believe that is all.

[852] W. HARDY HENDREN, JR. was thereupon recalled as a witness for the respondent and, having been previously duly sworn, testified further as follows:

. DIRECT EXAMINATION (Continued)

Q. (By Mr. Cozad:) Mr. Hendren, you have testified before in this proceeding, and if I recall correctly, it was in Colorado Springs?

A. Yes, sir.

Q. You are the president of the United Film Service?

A. Yes.

Q. As I recall your testimony before, Mr. Hendren, you testified that you have exclusive theater screening agreements, the majority of them are for a period of two or three years; is that correct?

A. Yes.

Q. What length of time do your advertising contracts, or your contracts with advertisers, run?

A. Issued for one year.

Q. Will you explain the relationship between the theatre screening agreement and the advertising contract with respect to the length of time of each con[853] tract?

A. Well, the relationship can best be explained through an illustration. If for example, we make a contract with a theatre, an exclusive contract with a theatre, and that theatre has prior to the time that we have made the exclusive contract been running film advertising service for some other company, if that

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other company has the theatre screen virtually full, and we will say that our rights to start selling on that theatre screen would not start until, for example, January 1st, 1949, and the rights of the other company did not end until December 31, 1948, then for approximately a year, during which time the theatre will be screening out to conclusion, the advertising contract that had been sold by the other film advertising company, there will be any little space in the theatre to sell to edvertisers. So that actually the amount of space that becomes available to us to sell within the limitation of the number of ads that the theatre wishes to run doesn't amount to a great deal until the beginning of the second year of our agreement with the theatre.

Now, in contracting with the theatre, we do so on the basis that revenue is of principal interest to the theatre in running advertising, and in order to demonstrate to the theatre owner, what we believe and what we are prepared to produce for him in revenue, we

haven't the opportunity to demonstrate that to him, or to let him enjoy the revenue that we can

produce for him, unless the period of the contract is sufficient to give us an opportunity to put into effect the screening rates that we have arrived at with him, and he feels that he wants the opportunity to see what we can do, and the only way we can have the opportunity is to have a long screening agreement with him, and that is a term of from two to three years.

Q. Now, Mr. Hendren, in connection with your manufacturer-dealer program, is it of any importance in the sale of the manufacturer-dealer program, the length of your exclusive screening agreements with theatres?

A. Yes, it is of importance.

Q. What/importance?

A. Well, from the time that you first begin to talk a manufacturer about a manufacturer-dealer film edvertising program until the time that you are ready to start actually offering his dealers the right to purchase that program for showing in theatres is about six months and sometimes it even runs longer than that. If you did not know that you had a definite exclusive

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contract with the theatre, so that you can offer a period of time contract that ran for two or three years at the time that you were talking to him, you couldn't assure him or give him any assurance that certain theatres would be positively available for his dealers to

[855] use when his program was produced and ready to offer to his dealers, which might be six or nine months from the date that you first started talking

to him.

Q. State whether or not it is a fact, Mr. Hendren, that when you sell the dealers on the showing of the film which has been usually produced by the manufacturer, do all dealers simultaneously and immediately sign contracts for the filming of those advertising films?

No, experience in the handling of manufacturerdealer programs has shown two things, first, that the manufacturer would never enter into the program if you had to say to him that the availability of these theatres would be for one year, and the reason that he wouldn't, would be for the same reason that he doesn't buy any advertising until it is a medium that he can count upon using once he has made the decision to use that medium. He wants to know that he and his dealers will be able to continue to use this medium when they have once started for at least a period of two or three years, so the dealer who normally purchases his campaign is buying it for a year's screening period normally, and the dealer wants to know that he will be able to renew and continue to use the medium after his first vear's contract is over.

We can't, in the case of a manufacturer who has as many as three or four or five thousand dealers, [856] we can't contact all of those dealers simultane-

ously with the release of the program. Experience has shown that it takes time to cover the dealers list, that at first the program is new to the dealers, many of them have heard about it, but they are hesitant about going ahead with it right away. They talk among themselves, and the experience with these programs is that in the first year of the program, the program is on the up-build with the dealers, starting off

usually in a slow way, with a few number of dealers purchasing it the first month, and then gradually accumulating speed for the sale of the service to the fealers, and in many of the programs it takes as much as a full six or nine months to cover a majority of these dealers. Then there are numerous dealers who, when contacted during the first year say, no, that they don't want to go along, but during the course of that year have a chance to discuss the thing and the program with other dealers, and decide that if the program is offered to them the second year they go along and buy.

Q. Now, Mr. Hendren, in selling advertising to the advertising customer, movie advertising, if you please, all of your advertising contracts with all of your advertisers for a given theatre or a given circuit are not entered into at the beginning of your exclusive screen agreements with that theatre or that group of theatres.

is that correct?

A. No, they are not.

[857] Q. Is it not a fact that you may sell and often do sell advertisers each month during an entire year so that you would have twelve separate agreements terminating at twelve separate dates?

A. Yes, sir.

Q. I believe you testified before, but if you haven't, you do show screen advertising for all and any film advertising distributor so long as the product meets the standards required by the theatre and so long as you have available space, is that right?

A. And so long as the length of the film falls within

the limitation of our agreement with the theatre.

Q. Would you give us the names of a few film advertising distributors for whom you have shown advertising films in theatres where you had the exclusive contracts?

A. For the Alexander Film Company, Reid-Ray Industries, the Motion Picture Advertising Service Company, Inc., of New Orleans, A-V Carrier Service Company, the Bilack,—I think they called themselves the World Screen Advertising Company, of Omaha, and others. Offhand, I cannot remember their names.

Q. You have offered, have you not, to show film ads for the S & M Service?

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A. Yes, we did.

[858] * CROSS-EXAMINATION

[860] Q. Now, when you enter into these contracts with the theatres you often find, do you not, that the entire time is already taken up, taken up with other advertising, don't you, Mr. Hendren?

A. When we enter into, may I hear the question

again, please?

Q. When you contact these different theatres you often find that the time that you contact them for the purpose of trying to enter into a contract with them, that the entire time is being taken up by other advertising, other advertisements, don't you?

A. Yes we find that true.

Q. And in cases of that kind, the theatres won't contract with you unless you agree to run out these other ads, isn't that true?

A. No, it is not true. They don't force us into the position of running out the other ads, Mr. Collins, we ourselves on the contrary, volunteer to do this: For the

reason that we are an industry in which personal

went into a theatre in which some other film advertising company was running, and we have had this happen, Mr. Collins, and we contracted with the theatre for the exclusive right to run on his screen beginning on a certain date, and if then, on that date, we compel the theatre to throw off all the other advertising that had been sold by some other company and force those advertisers to make new contracts with us, we would only leave a bad taste in the mouths of the advertisers and we would have done something to have hurt our business rather than hold our business, and so we always say to the circuit and to the advertiser that any contract that they have in effect with any other film

advertising company, we want them to go ahead and complete them.

Q. So that subject, then, is not brought up by the theatres?

A. Rarely so, sometimes it is, but if the theatre has made an agreement with the other film company, if it has a stipulation with them, a prior stipulation which says that they had agreed to run to conclusion any advertising for them, in that event they would run this agreement to conclusion.

Q Isn't it true that all of the advertisers request a specific length of time for their advertising to run, is not that true?

A. Yes.

[862] Q. And that is done whether the distributor has a contract with the theatre or not, isn't it?

A. Well, Mr. Collins, the distributor, if he had no contract with the theatre, he couldn't very well make a contract with the advertiser in which he was going to agree to furnish film service for a given length of time unless he has some supporting agreement with the theatre.

Q. Yes, and in this case he has some understanding with the theatre, whether it is verbal or written, does he not?

A. Yes.

Q. And then he goes out and tells the advertiser, isn't that the way it is operated?

A. Yes, that is the way it is operated.

Q. Then he goes out and tells the advertiser, "I will give you that service for a specified length of time"?

A. Yes.

Q. And he wouldn't be in position to do that unless he would have an understanding with the theatre?

A. That is right.

Q. And then is it your experience that the theatres will insist on living up to those understandings, or will they say, "I will enter into a contract with you," and forget about that other understanding?

A. They will say, "I will live up to the understanding."

Q. And it is for the purpose of having the [863] other fellow's advertising screened out, isn't it?

A. It isn't our having to screen it out, it is the theatre screening it out. We are not handling it.

Q. But the theatres are going to live up to their agreements and screen out the advertising?

A. That is right.

Q. And during that time the United is excluded to that extent?

A. For the number of spaces being used for that

screen-out, yes.

Q. Now, Mr. Hendren, would it not be possible for you to ascertain from the theatres the length of time which their screens would be filled with advertising before you entered into a contract with them?

A. Yes, it would be possible for that to be done, Mr. Collins, the theatres would have to get an accurate detailed record from the other advertising film companies the list of advertisers, exactly when each one is terminated, yes, it would be possible to do that.

Q. Would it not be possible for you to begin the date of your agreement when the services of the other com-

panies had been completed-

Trial Examiner Kolb: Pardon me. We will have a recess for a few minutes.

(A short recess was taken.)

[864] Trial Examiner Kolb: On the record.

Mr. Collins: Now, let's see. Let's read the preceding question. I don't remember what it was

The WITNESS: I remember what the last question

was. Do you want me to tell you?

Mr. COLLINS: Yes.

The WITNESS: You had asked me if it would not be possible for us to being the date of our agreement when all of the services of the other film companies had been completed, and the answer to that, Mr. Collins, is this: That all the contracts that the other film companies had for advertising shown on this theatre do not terminate at one time. They terminate and shelve off by degrees,

perhaps after the selling rights of the other company have ended, and they are screening out to conclusion what they have previously sold, perhaps in the first month, maybe the screenings will be filled, maybe in the next month enough customers contracts will have been completed, so that only seven-eighths of the screens are filled, and then the next month, five-sixths, and so on, and it gradually works out, and it takes about a year before all of those contracts are completed.

Now, if we didn't have our contract start so that when the first space on the first theatre became available,—we would be there prepared to go out and sell that space and begin to pay the theatre revenue for it,—.

if we didn't have that arrangement, then there would be a period from six months to a year when nobody would be selling for the theatre,

and the theatre wouldn't be getting the benefit of the income that could be done through that additional selling.

Q. Now, do all of your contracts with the advertisers expire on the same dates?

A. No, sir, because they are not sold on the same

Q. And in your experience have you ever had contracts with advertisers that ran beyond the dates of your contracts with the theatres?

A. It is normal procedure for us to have contracts with the advertisers that run beyond the normal selling rights in our contract with the theatre, but our contract with the theatre provides that they will screen out to completion contracts that we have with the advertisers that have been sold prior to the termination of our selling rights.

Q. So that there would be nothing there to prevent you from screening out any advertising program that you have sold previous to the termination of your contracts?

A. That is right, sir. I do want you to understand that question of filling screen space with advertisers,—that it isn't a case where there are hundreds of advertisers in every town waiting to get on the theatre screen. It is a selling job, and frequently we will make a con-

tract with a theatre or with a circuit and we will use some of our top grade salesmen to get the job [866] done, and it may be that we never will get the cheatre screen or the theatres in the circuit all filled. We are constantly working to keep as much of

filled. We are constantly working to keep as much advertising on that screen or those screens as this theatre exhibitor will permit us.

Q. Up to the limit of your contract?

A. Up to the limit of what he will run.

Mr. COLLINS: I think that is all.

REDIRECT EXAMINATION

Q. (By Mr. Cozad:) One question, Mr. Hendren. In screening out to conclusion, advertising films for advertisers after the expiration of your exclusive agreement with the theatre, the theatre completes the screening of those advertising films, United has nothing to do with it, isn't that correct?

A. That is right, the theatre does.

Q. In other words, United's contract with the theatre provides that the theatre will screen to conclusion your films which you have contracted with advertisers to have shown upon that theatre screen?

A. Yes, sir.

Mr. Cozad: I believe that is all.

[870] Trial Examiner Kolb: Now, I would like to go back to national advertising. I thought I knew what national advertising was, but I am confused. Will you define that for me?

The WITNESS: Well, I will try to define national advertising as it is t'ought of in connection with our industry, the motion picture advertising business.

In our business, there are three classifications of business, one is local advertising, which is the advertising we sell to the local merchant, to the local town for screening in local theatres.

The second is what we call our manufacturer-dealer advertising. That is a service where we sell a national manufacturer on producing a series of films that are designed to sell the product he manufactures, and which

product is retailed through dealers. Now, when that series of films have been produced then we go out through our sales staff and contact the dealers and we negotiate agreements with those dealers for the screening of these films in their local theatres. That is a manufacturer-dealer plan and sometimes that dealer is told

that, well, if you order the service for screening our local theatres, the national manufacturer will cooperate with you or participate with you

in the cost of that screening service.

In other words, here is a contract, it calls for so many weeks of showing in a certain theatre, the volume of the contract is going to be, we will say, \$250. Now, the manufacturer has authorized us to tell you that if you think well enough of these films to order them for screening he will pay fifty percent of that bill, you pay the other fifty percent. That is the manufacturer-dealer. The state national program—

Trial Examiner Kolb: Along that line, Mr. Turner testified with reference to the language you have just described whereby the manufacturer induces the dealer

himself to cooperate with the plan?

The WITNESS: They do assist us through the publication of promotion broadsides, dealers' meetings, and so forth, it is must to their advantage to have the dealers match dollars with them for the screening of films that are promoting the manufacturer's product, because by so doing, if they can persuade their dealers to match dollars with them then they will create two dollars for each one dollar that its costs the manufacturer of the product.

Now, the third division is what we call national advertising, and that is where a large national advertising, and that is where a large national advertiser, whose product is distributed, not by franchised dealers, but by many dealers in a town, as for example, Alka-seltzer, that is sold by every drug store in town, the manufacturer will have a series of films produced to advertise his product, and then he will place orders direct with us for the distribution and showing of those films nation-wide, and he will pay us direct.

Trial Examiner Kolb: If your Alka-seltzer manufacturer arranges for a cooperative deal with his local distributors, that then ceases to be a national advertising and becomes manufacturer-dealer advertising?

The WITNESS: Yes...

Trial Examiner Kolb: So it depends upon whether he is cooperating in the advertising, the local dealer?

The WITNESS: Yes, if field contact is necessary by our sales staff with the dealers then it will be a manufacturer-dealer program, but if that field contact is not necessary,—of course there are exceptions, but usually it doesn't carry the name of any local dealer because the manufacturer's film that is advertising his product is sold by many local dealers and not by just one.

Trial Examiner Kolb: That is all.

[873] Trial Examiner Kolb: During the hearings held the past ten days, a number of theatre operators or owners testified with reference to their reasons for dealing with distributors on an exclusive contract basis, and have detailed the practical difficulties which arose unless they dealt with one distributor. Similar testimony has also been introduced by salesmen of screen advertising.

At the time this testimony was offered, objections were made that such testimony was not material to the issue of the case.

The Trial Examiner overruled these objections and permitted the witnesses to answer subject to a motion to strike. At the close of the testimony of each of such witnesses a motion to strike was made by the attorney supporting the complaint, and the Trial Examiner reserved his ruling upon such motions to a later date.

The testimony introduced subject to said motion to strike and statements of counsel in the record indicate that it is the contention of the respondents in connection with their defense of the lack of public interest and the absence of restraint upon trade.

That their contracts with theatres are for limited periods of time covering screening space which they

normally expect to fill during the period covered by their contracts.

That the terms of their contracts are to some extent dictated by practical considerations, economic [874] conditions and demands of theatre owners.

That the contracts executed by them do not in fact restrain trade since the negotiation of contracts from time to time is highly competitive, and even after negotiation competitors are permitted to display advertising where screening space is available.

That the exclusion of competitors where this has oc-

That the exclusion of competitors where this has occurred has to some extent been due to considerations

other than that of an exclusive contract.

In view of these contentions, it is the opinion of the Trial Examiner that testimony dealing with the execution and operation of the contracts should not be cut off at this time. The objections involve the weight of the evidence rather than its admissibility. While some of this evidence is so remote as to have little value in the determination of the issues, yet the decision of the Trial Examiner at this time is not as to the weight, but only as to the admissibility of such evidence.

It is the further opinion of the Trial Examiner that the practical difficulties and economic considerations involved have a bearing upon the nature of the remedy to be applied if the Commission should ultimately decide that corrective action is necessary.

For the reasons above stated the Trial Examiner at this time denies the motions of the attorney supporting the complaint to striks the testimony of Irwin Neygaard, James G. Randgaard, Martin Levedoff, Ralph S. Price, Arthur M. Sunde, G. Ralph Branton, Myron Blank, W. R. Arendt and C. C. Alexander.

Mr. Collins: I take an exception to the ryling of the Trial Examiner.

[878] E. L. SEITZLER was thereupon called as a witness for Respondent and, having been first duly sworn testified is follows:

DIRECT EXAMINATION.

Q. (By Mr. BURGESS:) In what business are you, Mr. Seitzler?

A. In the jewelry business.

Q. How long have you been in the jewelry business?

A. Twelve and a half years.

Q. During the time you have been engaged in the jewelry business, have you had occasion to use film advertising?

A. Yes, sir.

Q. How long ago did you start film advertising?

A. Approximately three and a half years.

Q. With what organization did you begin your film advertising service?

A. I believe it was the Theatre Publicity Service.

Q. What was the service that you obtained from them?

A. I had them come into the store and make a film of my store, of myself and a few other people, and run it for six months on the screen.

Q. And that was one film that you had made up?

A. Yes, sir.

Q. What was the nature of that film, other than the explanation you have already given of it?

A. Vdon't believe I understand?

Q. Was there any sound tract with that film?

A. No, sir, no sound tract, no color, and the photographer took the movie without giving me sufficient instructions what to do, when he ran it on the screek. I looked like one of these old Hal Roach comedy things. My first appearance in front of the movie, I was at a loss how to act and what to do, and they failed to give me instructions. They rushed the picture through too fast and when it appeared on the screen, it reminded me when I first started to go to the movies, my awkwardness. They should have cautioned me at least a minute or two, I ran out of words, and stood there like I was at a loss what to do, and it didn't make a very good film.

Q. How was it run on the theatre screens, what arrangements?

A. It was run by the week, for a given sum, which I don't remember, I would have to look at the contract to state it definitely, but for a period of six months they used it at various theatres, I really couldn't state that without reading the contract.

Q. Was it used for a week in one theatre, [880] then the same film transferred and used for a week in another theatre?

A. That is correct.

Q. Did you use that service at all after the first film?

A. I decided that when that—I signed a contract to run it for six months, when that was up, I kept my word on the contract, even though I was dissatisfied, and didn't renew it.

Q. So that film you had made by Theatres Service was not satisfactory to you?

A. No, sir, I didn't like it.

Q. Are you using screen advertising now?

A. Yes, I am using Alexander Film Company now.

Q. And is that service satisfactory to you?

A. It surely is, they have more of a professional type of film that looks like a regular film that you see in the movies when you go to see a movie, and the acting in the film is smooth and it is a clear film which is much more attractive and plan than my other one was, and it makes a good impression on the public, it is not so boring. I saw one last night at the Texas Theatre, it is very attractive:

Q. How does the cost to you contain with the price you paid for the film and servicing of the other film?

A. I find it cheaper to buy stock made film, not only in money, but for results produced for a given amount of money.

Q. How long have you used the Alexander

[31] Film Service?

A. Ever since a short time after I had this film made at a price of \$150.00 and didn't like the results, it has been about three years.

Mr. Burgess: That is all.

Mr. COLLINS: Mr. Examiner, I move to strike all the

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evidence offered by this witness as not relevant, and immaterial to the issues in question.

Trial Examiner Kolsa The motion will be overruled.

Mr. Burgess: I may state here, in order to keep to the record, I do not believe Mr. Collins would have made the motion had he connected the service here used with Mr. Reichart, who was used in Houston, that was his company. I think the record shows that.

CROSS EXAMINATION.

Q. (By Mr. Collins.) Mr. Seitzler, those two companies, the Theatre Publicity Service, and the Alexander Film Company are the only two companies that you have anything to do with?

A. I believe I had a very short contract for a Christmas season one year, it seems to me like it was just one or two weeks for special Christmas trade, that was about two or three years ago, I don't remember exactly, it was just a short sketch for Christmas.

Q. The service that you are now getting from the Alexander Film Company, that is the pictures, are not

pictures of your place or business?

A. No, sir, they are not.

Q. It is just a stock film?

A. That is right, and very attractive.

Q. But it is no more applicable to your place of business than it would be to any other jeweler?

A. No, sir all jewelry stores are about alike, and one film would be as good for one as it would for another.

Q. Now, Mr. Seitzler, you were speaking about the results that you obtained; now, how did you go about arriving at a comparison of the results?

A. Well, by the customers that came in the store, they sort of ribbed me about my film I had made in the store, and made fun of it, and when I started these other a number of my old friends came in and told me how attractive it was, and how nice it looked, so that influenced me considerably.

Q. How did the number of people who came in and ribbed you as you say, with reference to the first film compare with the number of people who came in and

complimented you with reference to the second film?

A. Naturally, I would have to guess at that. From time to time people would come in over a period of time. I had more complimenting me on the Alexander, because I ran it longer.

Q. But for the same period of time, how would you

say the number compared?

A. Well, I can remember the ones that

[883] teased me, much plainer, than the other.

Q. They were more numerous, is that right?

A. Not necessarily, it was a little sharper remark

than I got on the other.

Q. What about the purchases obtained? Did those that ribbed you buy less than those that complimented you?

A. Most of these people were personal friends who come in, rather than to buy, in most cases, that I had

known for many years.

Q. So from the standpoint of the financial gain to you, you are not in position to say that there was any

difference, are you?

A. Well, I wouldn't say that for this reason, because I am now spending over \$1,000.00 a year with the Alexander, where I would not have spent a given amount for another home made film, so I naturally say the results were much better.

Q. How much did you spend for the other?

A. I spent \$150.00 to buy it, which I didn't have so pay Alexander, and I paid \$450.00 to run it. I have a contract that will tell exactly, that is the best I remember.

Q. The price of running it was approximately the

same?

A. Yes, but it didn't seem to make as good appearance to the public, it didn't get the results that I desired. I have dropped all other advertising in favor

of the Alexander Film Company advertising.

[884] The Dallas News, the Times Herald, and the Oak Cliff Shopping News, I feel I get more for my money from this film advertising, in my community.

Mr. Collins: That is all.

L. M. RICE was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (By Mr. BURGESS:) Will you state your full name?

A. Liston McLeod Rice.

Q. Where do you reside, Mr. Rice?

A. In Dallas.

Q. In what business are you engaged?

A. I am a practicing attorney.

Q. How long have you been a practicing attention at torney in Dallas?

A. Since 1921.

Q. Do you specialize in your practice in any particular type of business?

A. I have.

Q. What is that speciality?

A. The speciality for the past—almost exclusively I might say—for the past ten or twelve years, I have represented motion picture theatre exhibitors. Prior to that time, I had a substantial practice in that field, but for the last ten or twelve years, due to various things, it has taken so much of my time that I am now practically exclusively in that field.

Q. Are you, from your practice, familiar with the chain of theatres known as the Robb and Rowley

Theatres?

A. Yes, sir, I have been their general counsel since March 19, 1925.

Q. As their general counsel, since 1925, have you had occasion to become familiar with all angles of the operation of their business?

A. Substantially all, yes.

Q. Are you familiar with the film advertising business as related to their theatres?

A. Yes, sir.

Q. Are you familiar with the problems which the chain has in connection with screen advertising on their

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theatre screens?

A. Yes, I think so.

[886] Q. Has Robb and Rowley shown screen advertising for some period of time?

A. Ever since I have represented them, I believe they had a contract for the circuit, or individual con-

tracts for theatre screen advertising.

Q. Have they, all during that time, had the same screen advertising company showing the film on their screens?

A. No. sir.

Q. When you first represented Robb and Rowley, what company engaged in film advertising showed their

film on the screens of the theatres?

A. When I first began to represent them, it varied. There were a small group of theatres, they only had thirteen or fourteen, they had a contract at that time, I believe with the Alexander Film Company, I am not sure about that, but they began to expand and make further acquisitions throughout Texas, Oklahoma and Arkansas, in various places, associations they made, they generally associated themselves with local exhibitors. They had contracts or methods of operation which sometimes are on a purely local basis, usually slides. Sometimes with an sency which furnished a moving picture trailer. I can't give you the year in which they first made a contract with Alexander Company advertising on the circuit as a whole on all their screens, but it has been quite a long time ago.

Q. For a period of time they did deal on a non-exclusive basis on the theatre screens of the

circuits?

A. Yes, sir, with the various agencies using their screens.

Q. And at this time they are using the Alexander

Film Service exclusively on the entire circuit?

A. They are, but there was a period when they used at least two others on the circuit, as a whole. They didn't renew with Alexander along in the late 20's or early 30's, and made a contract with another agency that was not used. Then a third agency, an individual

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who was promoting an agency secured an agreement with them, but both of these were unsatisfactory for various reasons and finally they returned to Alexander, I don't know how long ago, exactly, I didn't check the records, but somewhere in the middle 30's, they returned to Alexander and have been continuously dealing with them since, on the circuit, as a whole.

Q. Do you recall the names of the other agencies with

whom they did business?

A. The first change was with a motion picture advertising service called MPA, out of New Orleans. Mr. William Johnson was the head of that agency. That contract was made, but was not renewed. Then a man named Horne, as I recall it, I think it was Elmer Horne, was then in Houston, and he had a different angle on the advertising on the screen, concentrating on national advertisers, and he induced my client to make an ar-

rangement with him which was continued for a sale rather short time, and after they concluded that

which—not the contract—but the relationship was established with Alexander, in which we have operated, under which we have operated, since then. I can get those dates if you would like.

Q. And the screens of the Robb and Rowley Circuit are now held exclusively by Alexander Film Company

for the showing of screen advertising?

A. Screen advertising, with a few exceptions, such as charitable, or any special advertising which the local theatre wants to put on. They have always cooperated fully in that. For example, while it is an exclusive contract in its terms, recently Mr. Tom Connors, formerly of Metro, undertook national distribution of a special film on tobacco, which in terms conflicted with the Alexander contract, but they cooperated very cheerfully and the film was shown as a short, it was paid for, we derived revenue from it. In local situations we have advertised on the screen, so while it is an exclusive contract, their contract has never stood in the way of anything that would better my client.

Q. From your experience as general counsel, and

your knowledge of the business of your client, what reasons do you have for granting an exclusive contract, exclusive privilege for showing screen advertising on the screens of your theatres?

Mr. Collins: I object to that, Mr. Examiner,

[889] as not being material to the issues.

Trial Examiner Kolb: I believe this man is o competent to give that information, that would come from the man who makes the contract, to determine the policy, would it not?

Mr. Burgess: I will qualify this gentleman further.

Q. As general counsel for the company, is it part of your work to negotiate contracts for Robb and Rowley?

A. Yes.

- Q. Has it been your duty as a representative of the company to determine the policy and negotiate the contract for screen advertising on the screens of the theatres?
- A. Not determine the policy. I can illustrate it better than I can give a general answer. Going back to MPA, advertising, I sat in on all of those. Not only as to the form of the contract, but the substance and the relationship. The same thing was true with Horne, and the Alexander, I sat in on all of those. As they came up for renewal, I endeavored to adjust the relationship with Alexander to the needs of my client as expressed by the directors and officials of my company.

Q. But over the period of twenty-three years that you have represented Robb and Rowley, you have sat in on directors meetings and assisted them in determining the

policies on all matters?

A. Yes, sir.

Q. And that includes the determination of policy as to screen advertising?

A. Res, sir, it has been the subject of discussion on many occasions, particularly following the unhappy experiences that I referred to.

Q. And you have advised with them on all of these

matters?

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A. I have.

Mr. Burgess: I think that qualifies this man for not

only an expert in his field, but for the knowledge of his client's business.

Mr. Collins: I ask that the terms of the contract, the consideration should be, as I understand it, the law would presume, they are set forth in the contract, and for that reason, I don't think the testimony is competent, I surely don't think that it has any bearing on the issues.

Trial Examiner Kolb: I think the reasons why the contract was entered into would be material, but this witness has said that he has attempted to draw up the contract in accordance with the terms, the ideas of his client, and the Alexander Film Company. In other words, he is attempting to bring down into a legal document the ideas which have been arrived at by negotiation between Alexander and his client, prior to the time he gets into it.

Mr. Burgess: No, he says he is in on the negotiations,

and advised with them on it.

[891] With the Alexander Film representatives the process under which they are going to do it and what

pictures they want, or does your client do that?

The WITNESS: It is done in a cooperative sense. Let me illustrate it this way: We had a problem on the circuit of this sort, some of the managers were not only non-cooperative, but rather discouraged screen advertising, failing to give their quota of space occupied, and apparently were partly the cause of that failure; and with the Alexander Film Company, I, personally, worked out a contract under which that theatre had a sort of quota base for it, and the proceeds of the contract on the flat renewal plus any division of excess earnings were prorated among the theatres in accordance with that performance. I didn't act, in other words, for Robb and Rowley, strictly, as general counsel, I am kind of an office boy, I am around there all the time, I do not represent Alexander and I have no particular brief for them, but I am a kind of a curious dick in this business. I don't rely on general counsel, and when I get in trouble, I usually go and get me a lawyer.

Trial Examiner Kolb: I will permit the witness to

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testify. Is there a question pending?

Mr. Burgess: Yes.

Trial Examiner Kolb: Read the question.

(The reporter read the question as follows:

"Question: Have you discussed with the Alexander Film Company representative the process under which they are going to do it and what pictures they want, or does your client do that?")

The WITNESS: It is best to give it as a matter of actual experience. When we changed from Alexander to MPA, we ran into several problems. Alexander had made contracts with local merchants for a period of time extending beyond the expiration of our contract with Alexander. Those terms had to be subjected to selling our local people. At the same time, MPA was attempting to sell them. Immediately we ran into the problem of selling the competitors advertising. We would not want two jewelry stores or laundries. MPA did cooperate the best they could, but we did have some disturbance there.

Again, we had a disturbance in two respects. Shipments were coming in from MPA to these smaller towns, shipments were coming in from MPA routed to various exhibitors on the circuit, various managers. At the same time they were coming in from Alexander, and that imposes two burdens. One of physical routing of the prints to the projection room, and, two the bookkeeping. The problem of ascertaining what time was consumed and how much space was consumed on the screen, and dividing the time between these two, then the competing agencies in that sense was a rather difficult problem.

It put an undue load upon these local people, and our accounting department. It was a difficult problem. That, plus the possibility of con-

flicting advertising.

We also found that we were getting a varied quality of material. One might not be particularly better than the other, perhaps, but there was a difference. One merchant, for example, would like, perhaps, the other film better. It was a source of harassment to the local managers. We had that experience before with our local

people, who had made private contracts with local merchants advertising slides or otherwise. I remember one department had a contract or some arrangement with an outfit in Kansas City, the name of which I do not recall, and (at the same time they had trade screened that company merchandise—now, the other reason, basically, in my analysis, and the executors of the company regreeded with me, it is important to—

Mr. Collins: Mr. Examiner, I object to this, I understand the witness said at the beginning that he was an attorney, and I hate to keep interrupting, but it appears to me that this is going into the realm of argument, and not stating the specific reasons. I want to object to it for that reason. I still want to object to it for

the further reason it is not competent.

Trial Examiner Kolb: He has testified as to the conflict with MPA and Alexander, is one reason, [894] now, he has started to give a third reason. I

with him should be stricken. He is testifying as to his own analysis, and not as to what anybody else thinks.

The WITNESS: I don't mean to be captious, but there never was a lawyer that was a good witness, he wants to argue one way or the other. In my own mind, now, guiding me in my relations with my clients, is this thought; all a theatre man has to offer to the public is time and space. We rent a chair for a period of time, we do not guarantee what is going on the screen, except there will be something there. That is a natural relationship.

Now, when we go to the deal with our screen time, what we do there is merely rent time and space. We rent the screen itself, we rent it for a period of time, for a use, for a certain purpose. Now, that concept, itself, I think, would be—would guide me largely in my advice to my clients about the handling of screen advertising generally. I think those are the principal reasons that occur to me that might be minutia, but I don't know of any at the moment.

Mr. Burgess: How many theatres are there in the Robb and Rowley chain?

A. I think at the present there are, including Little Rock, which is not in the principal circuit, but is privately owned by the heads of the firm, around a hundred and twenty of them, I am not sure, they vary [895] from time to time.

Q. Is the screen advertising business a very

small portion of the business of the theatres?

A. Yes. In the aggregate, it is small, it is a healthy piece of money, but it is not all important, it is relatively small.

Q. Would you be interested in handling the business, of screen advertising with more than one advertising

company at a time?

A. No, we have had that problem.

Q. If it was necessary for you to handle business with more than one advertising screen company at a time, would you handle any screen advertising at all?

A. Oh, we might, if it was just absolutely necessary, but I cannot figure anybody making us rent our screens to anybody we don't want to rent them to, I don't see how anybody could make us take two when we don't want but one. We would take one or the other with or without a contract.

Q. But you were limited, so that it was necessary tor you to do business with more than one, would you do any screen advertising?

Mr. Burgess: I think that is all.

[907] LAFE REHMAN PFEIFER was thereupon called as a witness for the Respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (By Mr. BURGESS:) Where do you reside?

A. 4625 Livingston Avenue, Dallas, Texas.

Q In what business are you engaged, Mr. Pfeifer?

A. In the advertising business.

Q. Have you had experience in the theatre business and theatre screen advertising?

A. It goes back to 1924.

, Q. Will you give us the history of your experience

with the theatre business and theatre screen advertising business?

A. Well, in 1924, I joined the old and now defunct James P. Simpson Company, their business was screen advertising, and I was with them until 1929, at that time I was labeled vice-president and general salesmanager of the company. They do business much in the same manner as the Alexander Film Company and MPA. James P. Simpson was the first, I 19081 believe, to inaugurate national advertising in the theatres in a big way, having been the first man, to interest General Motors, the Chevrolet Division, in nationally advertising the Chevrolet automobile, and I think that was the beginning of big advertising among national advertising. He died in 1929 and the company dissolved after that, and then I went with the Jamerson Film Company, selling what was known at that time as Jamerson Film mats. We did business on a purely local basis, and without having enough coverage in theatres to really make it big, it soon dissolved, and I went at that time-well, I was still with them at the time I went

Q. What is the Interstate Circuit?

A. The Interstate Circuit is a group of theatres operating in Texas and one theatre in Albuquerque, New Mexico, they have at the present time 153 theatres.

with Interstate Circuit on the 3rd of January, 1936.

Q. How long were you with Interstate?

A. Until 1947.

Q. And what was the nature of your work with Interstate Theatres?

A. Well, I originally joined the company for the purpose of taking charge of their screen advertising department. It was felt they needed, and I sold them on the idea that they needed somebody actively in charge

of that department. Well, my knowledge of the [909] business at that time was considerable, which I had gained in past experience with other companies, so I joined that company and took charge of their screen advertising department. From that point on, I had full and complete charge of it.

Q. Will you explain what their screen advertising

department was?

A. At the time I took charge of it, they had exclusive screen advertising contracts with the old Elmer Horne company on a guaranteed basis, and that lasted until the contract expired, which was sometime in 1947, the early part of 1947, that contract expired. I think it was on January — one day early in January.

Q. 1947 or 1937?

A. 1937. We then negotiated a contract with the new company known as TAD Theatre Advertising, the initials meant something. I forget just exactly what it was. TAD, and that company sold out, or were taken over by some negotiation, by the Alexander Film Company, and we honored the contract and Alexander then operated in the place of TAD, selling all the advertising in Interstate Theatres.

Q. For what period of time?

A. For the balance of that contract, which I think was originally written for three years. It covered 1937, 1938 and 1939. I would not be positive on that point,

but I believe it was a three-year deal. We [910] then took over—instead of renewing the contract,

we thought we could make money—which after all is the prime objective in running a theatre advertising, by operating the thing ourselves, so, although at the time we had bids from MPA, we decided to create a department completely our own, to do our own selling and take all of the profits that would otherwise have gone to a film advertising company, and this we did, and quite successfully, until we were getting approximately three times more from our screen rentals than we had ever received from a film advertising company.

Q. For what period of time did Interstate engage in film advertising on its own account?

A. From that time until September 13, 1946.

Q. And you were in charge of that department during all that period of time?

A. Yes, sir, completely in charge.

Q. Now, what occurred on September 13, 1946, in relation to film advertising?

A. Well, there had been some discussion for about a year or so as to whether or not it was advisable to continue with screen advertising, so in spite of all the revenue that they were receiving, we decided on that particular day—I recall it very vividly because of the fact that it was a rather crushing blow to me to have

them destroy with one fell swoop, all the work

[911] I had been doing personally for all those years, to build the thing up, but they decided to discontinue completely all screen advertising.

Q. Do you know what reasons they had for coming

to that conclusion?

A. Well, primarily it was because they felt-

Mr. COLLINS: I want to object to that.

Mr. BURGESS: I will withdraw the question and save you the trouble.

Q. Has Interstate engaged in any theatre screen ad-

vertising since September 13, 1946?

A. There is only one instance I know of, that is when they took on the film known as "Tobacco Land," produced by Chesterfield cigarettes.

Q. During the time that they ran their own screen

advertising, where did they obtain their film?

A. Well, mostly we had special productions, for the larger accounts, and for the small towns where we had fewer theatres, where it was not practical to produce a special film because of changes involved, we rented those films from both Alexander and MPA?

Q. So that you had special productions made where

it would warrant the expense?

A. Where you could come out on the production.

Q. Who made those special productions for

[912] you?

A. Most of them were made by Jamerson Film Company, a local film laboratory or studio, whatever you want to call it.

Q. Then for your local advertising film, you obtained

it from Alexander or from MPA?

A. Yes, that is known as Syndicated Service, where the body of the film is applicable to any particular type of business, like a drug store series or garage series, or

bank series, and identify it for the advertiser by simply using the name.

Q. So if you sold a syndicated service for use on the screens of Interstate Theatres, you simply made application to MPA for their film and used that advertising.

A. That is right.
Q. Did you ever have any difficulty obtaining these syndicated films from MPA or Alexander?

A. No, sir, they were both very cooperative.

Q. And that was true during all of the time that Interstate was engaged separately in the advertising business?

A. That is right, we had our own production, sales force; sold it exactly like they were, except we didn't

have the production facilities.

Q. When Interstate was doing business with the various different film advertising companies, all of your films handled on an exclusive contract basis with those film advertising companies?

A. Well, whenever there was any-

Q. I mean prior to the time that they en-9131 gaged in business?

A. Yes, sir, there was only one company operating

at the time, only one selling agency.

Q And you were directly in charge of that work for them?

A. That is right.

Q. What reasons did you have for entering into an exclusive contract with the advertising film agency?

Mr. Collins: We should like to know at what period of time counsel is inquiring about, whether it was Sep-

tember of 1946 or when.

Mr. Burgess: Well, he has testified that they engaged in their own business of film advertising from 1939 to 1946. Prior to that time they had other companies from time to time on the screen, I think perhaps I haven't asked that question.

.Q. Has Interstate Theatres used any screen adver-

tising since September 13, 1946?

A. Well, there was the expiration of the Interstate contract at the time the decision was made to discontinue the advertising I was instructed to get as many cancellations as I possibly could. So I wrote all of the existing clients and asked them for their cancellations, and I had only had about two per cent of cancellation on all of the business then in force, and those contracts

[914] about about June, 1947, was the last contract that was on, the last contract that expired.

Q. And after September 13, 1946, no new contracts were entered into?

A. No.

Q. And no other screen advertising company has been permitted to show any advertising on the screen?

A. They have made no deal with any company.

Q. Now, prior to the Interstate Theatres engaging in screen advertising on its own account, when it was doing business with the other advertising company, did

they do business on an exclusive basis?

A. When I came with the company, they had an exclusive contract which was executed before I came with the company, with the Elmer Horne Film Company, and I think his company's name was Theatre Advertising Service. I believe it was. I think it was known as the Elmer Horne Company. He was the head of the concern at the time, and at the expiration of his contract, as I say, I believe it was that Alexander and MPA and the new company, TAD were all negotiating for, and selling privileges in the theatres, but the contract was awarded to TAD on the basis of the larger guarantee they felt they could make.

Q. So that when the Horne contract expired, there were several different companies who attempted to get

the screening privileges for screen advertising?

A. It was more or less on a bidding basis.

[915] Q. But TAD was the highest bidder and obtained the contract?

A. As I recall it.

Q. And that was an exclusive agreement with TAD upon the expiration of the Horne contract?

A. An exclusive contract, fes.

[950] FORREST DUNLAP was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (By Mr. Rosen:) Where do you live, Mr. Dunlap?

A. Dallas, Texas.

Q. What is your business?

- A. In the theatre business, and the theatre chain business.
 - Q. Do you own and operate any theatres?

A. Yes, sir.

Q. How many?

A. Well, I have owned and operated sixteen, I don't have quite that many now, small town theatres.

Q. What is the name of your company?

A. Dunlap Theatres.

- Q. How long have you been engaged in the theatre business?
- A. Well, I have been connected with the industry about twenty-five years. I have been operating my own theatres about twelve years.
- Q. So for the past twelve years, you have owned and operated some theatres?

A. Yes, sir.

Q. In small towns?

A. Yes, sir.

[951] Q. As many as sixteen at one time?

A. No, sir, I didn't have sixteen at one time, the most I had at one time was thirteen or fourteen.

Q. Have you ever had any experience in connection with exhibiting motion picture advertising on the screens of your theatres?

A. Oh, yes, yes.

Q. When did that start?

- A. Oh, I was using it back before the sound days, that is ten or twelve years ago.
- Q. When you started out having advertising film on your screen, was the screen contracted to one distributor, or was it open to more than one?

A. No, sir, it was wide open.

Q. What kind of arrangement at that time was made

with the distributors?

A. Well, I set my own price, told them what I wanted; for instance, making a little illustration, Alexander Film was open, MPA, and back in those days, I forget the name of the concern, here in Dallas—

Q. Yes.

A. —I didn't have an exclusive contract with anyone, consequently—may I explain this thing in my own words?

Q. That is what I want you to do.

A. Consequently, maybe MPA said, "We [952] can't go in there and get me so many deals because they are limited to six," they ran about four or four and a half minutes. Alexander would do the same thing, and these other people, so, consequently. I didn't have anything on the screen, not very much.

Q. When you say limited to six, is that six adver-

tisements for each performance?

A. Yes, sir, that is right.

Q. That was the policy of the houses?

A. Yes, sir, that is right, because if you made it too long, it would get tiresome to your patrons.

Q. And would you say in those days you set the price

· of the ads and limited the number of ads?

A. Yes.

Q. And the screen was open to at least the three you mentioned?

A. That is right.

Q. Did that policy prove satisfactory?

A. Very unsatisfactory.

Q. Why?

[954] The WITNESS: I was not getting the revenue on my screens.

[955] Q. Your policy at that time was to permit six ads?

A. That is right.

Q. How many were you getting with that kind of policy?

A. Oh, I was getting about two or three, or four.

this week, maybe next week I wouldn't, maybe I would have too many in there, maybe next week I wouldn't have enough.

Q. Then from week to week, you mean certain weeks

the ads were less than the number you needed?

A. That is right.

Q. And other weeks more than the number you wanted?

A. That is correct.

Q. And that arrangement did not suit you as an exhibitor?

A. No, sir.

Q. As a result of your dissatisfaction of that method of handling advertising, what policies did you adopt three or four years ago.

A. I went with an exclusive contract, had an exclusive contract because they said they would get out and work the territory and get enough ads on my screen.

Q. With whom did you make such a contract?

A. Well, I had a contract one year with Alexander, then I had contracts with MPA:

Q. Who has the contract now?

A. MPA.

Q. How long did those contracts run?

A. One a year, only.

So when you changed your policy from a non-exclusive arrangement to an exclusive, you first gave a contract to Alexander for a year?

A. Yes, Alexander might have had two years, I don't

remember.

Q. One or two years?

A. That is right.

Q. Then you gave a contract, an exclusive arrangement to MPA?

That is right. A.

Q. They still have it? A. Yes.

Q. How long is your present contract?

A. Well, it ends-

Q. For how long a period?

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ander, one year at a time.

Q. What is the arrangement as to the compensation you get as a theatre owner?

A. A per cent.

Q. It is a percentage arrangement?

A. Yes, sir, and I set the prices, what I want for each ad that is on my screen, I tell the film companies, like you or Alexander, what I want, what I think it is

worth, then I get a certain percentage of it.

[957] Q. There is no minimum guarantee under the present arrangement?

A. No.

Q. So that you started out about ten years ago with advertising?

A. Yes, sir, ten or twelve years ago.

Q. So, for about seven you ran it on an open basis?

A. That is right.

Q. About three years ago you started to run it on a exclusive basis?

A. Yes, sir.

Q. First with Alexander, now with MPA?

A. Yes, three or four years ago, I don't know exactly.

Q. Has the change of policy proved to be satisfactory to you?

A. Very muchly so.

Q. Why.

A. I get more revenue.

Q. Are there any other reasons?

A. Well, Alexander and MPA fight each year trying to get the film contract from me—

Mr. Collins: Mr. Examiner, I want to object to that as not responsive to the question, and make a motion to strike it.

Mr. Rosen: I believe it is responsive, when he [958] says his reasons, he says he gets more revenue, what he means is since it is competitive between the competitors.

Mr. COLLINS: Well—

Trial Examiner Kolb: You argue the question before I know what the witness is going to say so I can't say whether it is right or wrong, he has testified he got

more revenue, then he was asked the question, and he started to explain-

Mr. COLLINS: Yet us get the reporter to read the

answer.

Trial Examiner Kolb: Read the answer of the witness.

The (reporter read the answer as follows:

"Answer: Well, Alexander and MPA fight each year trying to get the film contract from me—").

Trial Examiner Kolb: You ask for the answer to be

read, is there any remark you want to make?

Mr. Collins: My statements on the record with reference to the objection I made—

Trial Examiner Kolb: Overrule the objection, the wit-

ness will please answer.

Mr. Rosen: Complete your answer?

A. In other words, Alexander comes to me trying to get a contract for the year, or over, and your man comes to me and wants a contract for the year. Because of

the fact that by having one concern handle all of my advertising, I get more advertising on the

screen, so I do not split it up, and if Alexander wants to give me more money than you, or after-I set my price, then I might give it to Alexander. I am not tied to MPA or Alexander either one.

Q. Is there competition between the two to get your

screen?

A. Definitely so.

- Q. As an exhibitor, is it advantageous or disadvantageous to you, where you have fixed advertisements, to have two or more of the same kind of business advertising at any one performance.
- [960] A. I am trying to answer the question right now, if you had two people, two different concerns, selling advertisements, they might have two drug stores on there, or two grocery stores—what you want is a variety. You like to have a filling station and a drug store, and so forth.

Q. From the standpoint of the exhibitor, you much

prefer a variety?

A. Your clientele prefers a variety.

Q. Your audience, you mean?

A. Yes.

Q. Because you are trying to have an attractive program for the audience?

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A. That is right.

Q. Is it attractive when there are two drug ads or two grocery ads?

A. No, sir.

Q. It is more attractive where there are different kinds of businesses advertising?

A. That is correct.

Q. Where you deal with one company at a time, are you able to control that policy?

A. Definitely so.

[961] Q. Were you able to control that policy when your screen was open to more than one at a time?

A. No

Q. Do) you also take into consideration the quality of the film, advertising film, in making up your mind which concern to do business with?

A. Yes, I do.

Q. When you had an open policy, was the quality of all the films displayed equal?

A. No.

Mr. ROSEN: That is all.

[968] J. I. CHRISTIAN was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. ROSEN:) Mr. Christian, where do you live?

A. Houston, Texas.

Q. How old are you?

A. Thirty-eight years old.

[969] Q. What is your business?

A. I am engaged in the sale of motion picture advertising in theatres, to be exhibited in theatres.

Q. With what company are you now employed?

A. Motion Picture Advertising Service, Inc. of New Orleans.

Q. How long have you been engaged in the Motion Picture business?

A. I have been engaged in the motion picture advertising business for a little over six years.

Q. When you started in that business, with whom

were you connected?

A. I was connected—I started as a salesman for Theatre Publicity Service, July 1, 1942.

Q. Who was the owner of that company?

A. Mr. William Reichart.

Q. Where were his headquarters?

A. Houston.

Q. You were a salesman for that company?

A. I was a salesman.

Q. Was there a gentleman by the name of Mr. Ross-connected with the company about that time, too?

A. He came with the office—he went to work for the organization in November, 1942.

Q. What were your duties at that time, when you came to work for that company?

A. My duties were to contact various types of business organizations in order to get them a contract for advertising, to exhibit in theatres.

Q. Let me get this first—how long were you connected with that company?

A. Theatre Publicity?

· Q. Yes?

A. Two years.

Q. And then what did you do?

A. And then I went to work for Ross Film Service.

Q. That is the same Mr. Ross who was connected with Mr. Reichart?

A. Yes, sir.

Q. You went to work for him?

A. Yes, sir.

Q. In a similar capacity?

A. Yes, sir.

Q. How long did that go along?

A. About nine months.

Q. And then what happened?

A. And then I organized my own company under the name of Publix Screen Service.

Q. That would be in about 1945?

A. November of 1944.

Q. How long did you operate that company?

[971] A. A little over two years.

Q. And then you started to work in your present capacity?

A. Yes, sir, for the Motion Picture Advertising Serv-

ice, Inc., in February, 1947.

Q Let us go back a minute; when you started to work as a salesman with Mr. Reichart, did he have any screens to show advertising on?

A. He did, he had theatre screens in theatres in the

Metropolitan District of Houston.

Q. Was he the only distributor showing advertising

on those screens that you spoke of?

A. I can't say, I don't know for sure, he was the largest exhibitor for advertising films at that time, I know that.

Q. What happened to his business?

A. Well, he couldn't give a guarantee to the theatre owners as to the type or quality of product to be exhibited in their theatres, to be a certain standard; also, he couldn't give a guarantee as to the variety of playlets that he could screen in the theatres, and couldn't guarantee to exhibit a certain number of ads for each theatre as he had contracted for; his business began to degrade to a lesser scale on the exhibition of our type of film.

Q. What was the kind of advertising films that he was exhibiting in 1942 and for the time you were with him?

A. Mostly what we call the reader type of service film.

Q. What do you mean by that?

A. Well, a film run on the screen with the name of the business, the address, and a few words on the mer; chandise, the service of the business, on the screen.

Q. It was a still film, no action?

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A. No action, except occasionally maybe a still shot picture on the screen, after the wording had passed off of the screen, or maybe the wording might be superimposed over the still shot picture.

. Q. Did he have any syndicated or library films?

A. Not unless you would count what films he had produced for a certain advertiser, but they were limited, they were still type service films, and might be different types, of two or three different ads, but they were still the same classification, reader type service films.

Q. How about the quality of the films you spoke of Mr. Reichart using, compared with those competitors in

the market at that time?

Mr. COLLINS: Now, Mr. Examiner, I object to that, and submit it is not material to the issues here.

Mr. ROSEN: Mr. Christian was working trying to sell in competition with other companies, Mr. Reichart had taken the stand for the Government, and the burden of the testimony was to try to show that the reason he lost out was because of the exclusive contract the competitors

had. Mr. Christian was working for him at the

think there were a variety of reasons which made his business unsuccessful, among which was the inferior quality of the films he was using, which had nothing to do with the question of the theatre screen agreement. We submit Mr. Christian is the best man you could use to prove that. He knows what he had to sell.

Trial Examiner Kolb: The objection will be overruled.

A. When other companies came into the picture, began to selling film advertisements, such companies as Alexander Film Company and Motion Picture Advertising Service, Inc., they exhibited a different kind of film, which produced better results with the advertiser. They exhibited a better type of film, a better type of product, improved variety and type, improved variety of playlets.

Q. What was the reaction of the theatre managers to the quality of the films you were selling for Reichart as compared to these sold by your competitors?

Mr. COLLINS: I object to that.

Trial Examiner KOLB: The witness is testifying to a difference in type of film and a preference of the theatre people to a difference in type. You are injecting quality in there each time, the witness is not testifying to that.

Mr. Rosen: Maybe I am missing my point. Trial Examiner KOLB: You are asking the witness about the quality, he is testifying about the type, so far as he has gone.

Mr. Rosen: Maybe I am wrong about it, I am using

the words synonymously.

- Q. I understand you to say that the type of film and the kind of film Mr. Reichart used was more or less reader?
 - A. Yes, sir.

Q. It is a still film?

That is right.

Without any, or very much, action involved in it?

A. No motion picture action.

SQ. What were the competitors of Reichart using at the same time?

A. They were using the motion picture playlets, on each program introduced by a title to the program, and then following that were various motion picture action scenes exhibited on the screen, for each scene they had a clarifying announcement, and at the end of the last motion action scene on the screen, then followed the advertisers signature, and his own personal copy, registered merchandise and service, that he was advertising.

Trial Examiner Kolb: You say he had a still picture, now you say at the end of each he had a trailer, did he

have both?

Mr. ROSEN: He is speaking of the competitors.

19751 Trial Examiner KOLB: I beg your pardon?

Mr. ROSEN: When you went in to sell the advertising to the advertisers, did they prefer the type of film that was used by your competitor, or the type that Mr. Reichart was using and you were selling or trying to sell?

Mr. Collins: I object to that.

Trial Examiner KOLB: The objection will be overruled.

A. After they learned of the tenure of the playlets that our competitors had to offer, then they preferred our competitors type of film ads, better than the reader ads.

d. What about the theatre managers who were screening these ads, did they prefer the kind you were selling,

or the kind your competitors were selling?

A. They preferred the kind the competitor offered.

Q. As a result of that, did Mr. Reichart lose some of the screens that he had when you first went with him?

A. . He did.

Q. Who got them?

A. The name of the company?

Q. I mean the competitors generally?

A. The competitors generally. To you want me to name them?

Q. All right?

A. Alexander Film Company.

[976] Q. At that time it was mostly Alexander?

A. Yes, sir.

Q. Then in a couple of years, you say you left Mr. Riechart, then Mr. Ross started a business, and you started to work for him?

'A. That is right.

Q. What did he do, go out and get some theatres?

A. He did. Competitors were in the field, then, to

a certain extent.

Q. What was the situation for the nine months you worked with Mr. Ross; I mean, had he adopted a different policy from Mr. Reichart or was he going along the same line?

A. Same line.

Q. With the same quality of film Reichart had had?

A. The same quality of film.

Q. With your competitors having a different quality?

A. That is right.

Q. Did Mr. Ross' business succeed?

A. No, it didn't. At first it was a fair success, later on business began to decline.

Q. You didn't see enough for you in it, and at the

end of nine months you left, is that right?

A. That is right, principally because Mr. Ross didn't have an organization that was aggressive enough to offer me enough opportunity to stay in business with him.

Q. Then you went in business for yourself?

[977] A. Yes, sir.

Q. What sort of an organization did you have?

A. The same type of organization Mr. Reichart and Mr. Ross had.

Q. Were you able to make a go in that type of organization?

Trial Examiner Kolb: You are speaking about the organization of the company or the type of the film?

Mr. Rosen: He went for himself.

Trial Examiner Kolb: I asked, are you speaking about the organization of the company or the type of the film?

Mr. Rosen: I will ask the specific question.

Q. What sort of organization did you have in regard to the sales force, type of film, and screening agreements with theatres, tell us about that, when you went in business for yourself?

A. I had the screening business, I had the theaties.

Q. Were they exclusive to you?

A. No, sir.

Q. Open.

A. Yes.

Q. What sort of films did you use?

A. Still shot film, reader type service films

Q. How many salesmen did you have working for you?

A. I had as many as three.

[978] Q. How long were you in business for your-self, Mr. Christian?

A. A little over two years.

Q. And then was when you went to work in your present position?

A. Yes.

Q. From the standpoint of the salesman, like your-

self, is it possible for him to earn a livelihood if he restricts his activities to the sale of advertising on theatre screens which are non-exclusive, open to competitors—is it possible for him to earn a living doing that?

Mr. COLLINS: I object to that.

'Trial Examiner Kolb: What does that have to do

with the issues in this case?

Mr. ROSEN: Let me explain what I have in mind. We were here attempting to show that from the point of view of the exhibitor, and the point of view of the distributors and the point of view of the advertising agency, or advertiser, and now from the point of view of the salesman, that the only practical way of operating a motion picture advertising business is to have some exclusive screens, as the backbone of the business, so they will have a market or something to sell, and I think it would effect your conclusions in the matter to show that for the Board. Every person that comes in touch with this industry finds you have to have exclusive theatre screen agreements in order to make a success of it. You cannot get a salesman to go out, and if you cannot have a sales force that can make a commission, I think that that would show the impracticability of running it the other way.

I submit it is relevant from that point of view.

Trial Examiner Kolb: I feel I have gone a long way in permitting the economic testimony with reference to

the sales force and so forth. I draw the line on whether

a salesman can make a living or not.

Mr. ROSEN: I will state what I expect to show; counsel tenders this witness in order to prove, from his experience as a salesman, it is impracticable for a salesman to work a territory which consists entirely of non-exclusive theatres screening arrangements, and that the backbone of the business is that the distributor must have exclusive agreements in order to furnish a market for the salesmen to sell.

[989] BERT E. GRAETZ was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. ROSEN:) Where do you live?

[990] A. Dallas, Texas.

Q. How old are you?

A. I am-I will be sixty-two years old next month.

Q. Mr. Graetz, you are now employed as the District Sales Manager for MPA?

A. Well, my proper title is Divisional Sales Manager.

Q. Divisional Sales Manager?

A. Yes, sir.

Q. For what territory?

A. For Texas, New Mexico and Arizona.

Q. How long have you been employed by MPA?

A. I would say approximately a little better than thirteen years.

Q. Had you been in the motion picture advertising business prior to that time?

A. Yes, sir.

Q. For whom?

A. I was employed by Alexander Film Company for a period of perhaps two or three years.

Q. Where did you start out with MPA?

A. I started as a salesman for MPA in the state of Tennessee.

Q. Just as a salesman?

A. Yes, sir.

Q. Working on a Commission basis?

A. Yes, sir.

[991] Q. Did MPA at that time have any theatre screening agreements with any theatres in Tennessee in the territory you were working?

A. Very few.

Q. What were your duties in Tennessee with regard

to selling?

A. My duties, when I went to Tennessee, were to acquire the screening rights to theatres, then also to sell the advertising to fill those spaces.

Q. Which came first, in the matter of timing?

A. Well, I had to contact the theatre owners before

I could sell any ads.

Q. Why?

A. Because you can't—the salesmen wouldn't go out to sell an ad unless he has a certain commitment and he knows that ad is going to be shown after it is sold.

Q. At the time you started in Tennessee, did MPA have any open screens that it was working which were

under non-exclusive arrangements?

A. Yes, sir.

Q. In those cases, you mean the theatre would show advertising, not only for MPA but also for competitors?

A. Yes, sir.

Q. Were you able to sell advertising to service those screens at that time?

Mr. Collins: I bject to that, Mr. Examiner.

[992] Trial Examiner Kolb: Read the question.

"Question: Were you able to sell advertising to service those screens at that time?")

Mr. Rosen: I mean the open theatres?

Trial Examiner KOLB: The objection is overruled.

A. I sold to some extent, it was quite an effort to

sell them, but I did sell them.

Q. What were the difficulties that you, as a salesman, encountered with regard to selling advertising for theatre screens that were open to more than one distributor?

Mr. Collins: I object to that, it is not the issue here. Mr. Rosen: I am just asking the facts within his own knowledge.

Mr. Collins: But the facts do not concern the issue involved.

Trial Examiner Kolb: Overrule the objection. You

may answer the question.

A. For a salesman to work entirely, or practically all theatres, that are non-exclusive, there is too much effort of several different men trying to fill that same screen.

Q. In those cases in Tennessee, were there a limited number of spaces that the theatre would permit all of

the competitors to fill?

A. Yes, sir.

[993] Q. How many of them generally?

A. I would say an average of about, some would run three ads a week, some six, but I would say an average of four ads.

Q. The policy would average about four,

A. About four ads a week, yes.

Q. How did you go from place to place, by auto-

A. By automobile.

Q. When you got to a certain town—when you got to a certain town, how did you go about trying to sell ads to fill these screens where they were open to com-

petitors, what did you do?

A. First, I had to contact the theatre owner, and find out how much available space was open, if he had a record of the advertisers that were sold by other companies, I will take a list of those, then I would try to sell other lines of businesses; however, in a good many cases the theatre man was not available at that time, or was busy with other salesmen buying films or something which was—

Q. You mean feature films?

A. Feature films, and so forth, that I could not afford to take up my entire day waiting on him, so I took a long chance and perhaps went out and sold one or two ads, if possible.

Q. With what results, when you would sell those ads?

A. The results were, in some cases, they were duplications. You had no knowledge when a

competitive ad was going to be shown in the theatre, and very often I would sell an ad to a competitive firm to be shown on the very same week; and either we had to or the theatre man had to notify us, or hold us for the following week, which naturally caused dissatisfaction with the customer as well as the theatre.

Q. All right. Then when you were in Tennessee,

what did you do to cure that situation?

A. I eventually, after a certain length of time, I contacted a large circuit of theatres and signed an exclusive

agreement, acquired exclusive rights for MPA.

Q. What had been their policy before you acquired—I mean—had they shown any advertising?

A. Yes.

Q. On an open basis?

A. No, part of their circuit was on an open basis, and the majority of their circuit was under exclusive agreement to Alexander Film Company.

Q. So they were operating both ways?

A. Yes, sir.

Q. What was the name of the circuit?

A. That was the Crescent Amusement Company, Nashville, Tennessee.

Q. What kind of a contract did you get, then, for the whole circuit?

A. I got an exclusive contract for all of their theatres, which covered the greater portion of Tennessee and a part of Kentucky.

Q. And then what happened with regard to your ability to sell advertising there, and how you serviced

those screens?

A. Well, we were—we were very successful, and we managed to fill all those screens, and brought the business of Tennessee and Kentucky from a very, very small business, up to a very substantial business.

Q. At the time you went into Tennessee, am I to understand that MPA had no exclusive screening rights

in Tennessee with any of the theatres at all?

A. No sir, not to my knowledge.

Q. You mean they didn't have?

A. They had none.

Q. And Alexander did have some?

A. Yes, sir.

Q. And you were able to get some exclusive theatre screening agreements in Tennessee?

A. Yes, sir.

Q. Did you run into competition in connection with

trying to secure those contracts?

A. Yes, sir. There are only two firms, two large firms, I should say, that operated in that particular section, which was Alexander Film Company and MPA,

and, naturally, we were both trying to get—
[996] they were trying to get a quantity and I was
trying to switch it from Alexander to MPA, and
I eventually won out.

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Q. Does that condition still exist today?

A. Yes, sir.

Q. Then what happened to you as an individual, after the Tennessee deal, where did the company put

you?

A. After I made a success, and appointed several different salesmen in Tennessee and Kentucky, they called me to the Home Office and appointed me the Divisional Sales Manager for the present territory that I have charge of.

Q. Texas?

A. Texas, New Mexico, and Arizona.

Q. What business did MPA have in Texas, or when you were appointed Divisional Sales Manager—I am

talking about in regard to theatres?

A. Their business in the State of Texas at the time I took it, they had a very, very small business, I employed one salesman at that time, and he operated, with my assistance, and managed to secure just a little business, that is the only way we could get anything.

Q. Is that the way you built up the business here?

A. Yes, sir.

Q. And the first thing you have to do to build up the business, as I understand, both in Tennessee and Texas,

was to sign up some exclusive contracts?

[997] A. Yes, sir.

Q. When did you say you commenced in Texas, how long ago?

A. Approximately six years ago.

Q. How many salesmen do you now employ under your supervision?

A. Eight.

Q. You started out with one?

A. Yes.

Q. Do you run into any competition in the State of Texas and Arizona and New Mexico in the securing of screen privileges?

A. Yes, sir.

Mr. Collins: I object to that, I would like to interpose this objection. The objection is that the witness should testify as to the facts, and it is up to the Commission to decide whether that constituted competition or not.

Mr. Rosen: That was merely preparatory to my next question. I was going to ask him to illustrate, give me facts.

Trial Examiner Kolb: The objection will be overruled. I think he can say whether or not he had competitors in this territory.

Q. You say you do have competitors in this territory?

A. Yes.

Q. And you have, since you have been in this state?
A. Yes, sir.

[998] Q. Is that equally true of New Mexico and Arizona?

A. Yes, sir.

Q. Who are the competitors?

A. Alexander Film Company is naturally, we consider, our largest competitors.

Q. Any others?

A. But there are other small independent firms that have a few films they might sell to theatres that they can get to run them. If they can have the theatres run them, they are glad to do it.

Q. Was Elmer Horne in business at the time you

first started?

A. No, sir.

Q. He had been, though?

A. Yes, sir, he had been.

Q. Can you give us an illustration, have you recently been able to secure an exclusive contract in Arizona with any theatres for MPA?

A. Yes, sir.

Q. Give us the names of the companies?

A. The Paramount Nace Theatres.

Q. How many theatres do they have?

A. Twenty-seven.

Q. Where do they operate?

A. In the State of Arizona.

Q. With whom did they have a contract until

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[999] recently?

A Alexander Film Company.

Q. With whom do they have a contract now?

A. Motion Picture Advertising Service.

Q. Who got the contract?

A. I did.

Q. When did you get it?

A. Approximately thirty days ago.

Q. How long does that contract run?

A. Two years.

Q. Do you know how long their old contract run with Alexander?

A. Two years at a time.

Q. Are there any others that you can think of that you have obtained in Texas during your six years regime here?

· A. Yes.

Q. Just give us some illustration?

A. Tri-State Theatres, Jefferson Amusement Company.

Q. Excuse me a minute. Do you know about how

many theatres Tri-State operates?

A. Tri-State operates probably eight or ten theatres.

Q. And how many does Jefferson?

A. Around sixty theatres, just about, somewhere close to that, between fifty and sixty.

Q. Any other theatre chains that you have been able

to get?

A. Yes, sir, you are speaking of chains, now?

Q. Yes.

[1000] A. The man who testified here today has a chain.

Q. Mr. Dunlap?

A. Yes, sir, and he recently sold several of his theatres, he has cut his down to very few now.

Q. He said he had about thirteen at one time?

A. Yes, sir.

Q. But he has fewer than that, now?

A. Yes, sir.

Q. Did you get that contract?

A. Yes, sir.

Are there others, like individuals, who have one or two theatres?

A. Yes, sir:

Q. Are all of those we are speaking of signed up on an exclusive basis?

Yes. sir.

Q. With terms running what-one, two, or three vears?

A. Usually one year, two years or three years. Some of them sign up for as much as five years, but in most cases they asked me to reduce it to one or two years, which is all right.

Q. The longest term of any of them is five?

A. I think the longest term.

Q. And the shortest is one year?

A. Yes.

Q. You would say on the average it would 1001] run about two or three?

.A. I would say about two.

Q. Now, in selling advertising, how long do those contracts generally run?

They usually run over a period of twelve months.

Q. You mean when you go in to sell a local advertiser, he would generally sign up for advertising over a twelve months period?

A. In the majority of cases, I would say about twelve months, I have on occasions sold a six months contract, or a shorter period of time, if necessary. Most of them are a year.

Q. Do those contracts sometimes come up for renewal, a follow-up campaign, I mean when the first contract has

run out with the advertiser?

A. Yes.

Q. Is it customary for you to give him a follow-up campaign?. L

A. We usually contact them, an advertiser, about sixty days prior to the expiration of his contract, and ask him for a renewal. In a good many cases, a big percentage of the cases, they are renewed.

[1010] B. F. WHITE, was thereupon called as a witness for the Respondent, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. ROSEN:) Mr. White, where do you live?

A. Dallas, Texas.

Q. What is your business?

A. I am in the theatre business, booking and operation of theatres.

Q. Do you own any theatres?

A. Yes, sir.

Q. How many?

A. I have a half interest in the Maple Theatre in Dallas.

Q. At the present time, you mean?

A. Yes, sir.

Q. How long have you been engaged in the exhibition end of the business?

A. In this last operation, I have been in it since 1943.

Q. And prior to that?

A. Prior to that, I have been, I guess ten years, in the exhibition, exclusive of booking, which is almost an integral part of it.

Q. Are you the sole owner of the Maple

[1011] Theatre?

A. No, sir, half owner.

Q. But you operate it?

A. Yes, sir, we have a manager out there.

Q. Have you ever done any motion picture advertis-

ing on your screens?

A. Yes, sir, we haven't adopted a policy in the new Maple to start with, but we had in the old one, and later adopted one in this theatre.

Q. How long have you shown advertising in the

Maple Theatre?

A. Something less than a year in this present operation.

Q. Prior to that time, your policy did not permit advertising on the screen?

A. No advertising other than advertising that you would call as a civic nature, or the type of advertising

that was instructive to the community. We didn't do any commercial advertising up until about a year ago.

Q. In the last year, have you a contract with any

motion picture distributor?

A. Yes, sir.

Q. With whom?

A. MPA.

Q. Under an exclusive basis?

A. I believe so.

Q. They are the only ones that show adver-[1012] tising on your screen?

A. That is right, we haven't contacted any-

body else.

Q. How long does the contract run?

A. I think it is for one year.

- Q. Prior to that time, you say you have been in the exhibition end, how many years altogether, I missed that?
 - A. 1943 to the present date, would be five years.

Q. Then prior to that?

A. Prior to that, I have been in it approximately ten years.

Q. During those ten years, what position did you occupy, did you own theatres?

A. Yes, sir.

Q. Or operate them for others?

A. I operated them or interested in them, sometimes I was manager for others.

Q. During the preceding ten years before 1943, you were in the exhibition field, you either owned it or had a part ownership, or operated it for others?

A. That is correct.

Q. During those ten years, did the screens that you had control over show motion picture advertising?

A. Yes, sir.

Q. On what basis was the advertising shown, was it an open policy or was it only one distributor?

A. It was an open policy, I don't believe we had any exclusive contract in these other theatres.

Q. So you have had experience in connection with

having an open policy for Motion Picture advertising, and at the present time you have an exclusive contract with MPA?

A. That is correct.

Q. From the exhibitor's point of view, which is the more advantageous?

Mr. COLLINS: I object to that, it is immaterial.

- Trial Examiner Kolb: The objection will be overruled.

A. I would say that in my present position, I don't know whether the circumstances after it in other situations, but in my present position, I prefer to have it with one firm.

Q. Advertising done through one firm?

Yes, sir. A.

What are the reasons that permit you to answer

the question that way?

In the first place, in the operation of a theatre like I have, we do not deliberately solicit advertising as a source of revenue, it is something that we consider, if we can service the people in our community and still make revenue and not bore our patrons with too much advertising, and we would like to do this with a firm that will understand our position and our needs and take care of those things.

Q. And if you have an open policy, why

[1014] couldn't that result be accomplished?

Well, you would have different people in the community that, more or less are friends of yours that would want advertising here and there, and they would have different kinds of advertising, and there would be conflicts of firms in the same line. In other words, my position is in selecting one firm to take care of my advertising, I can outline to them what I want and they will take care of it, and I know my customers advertising on my screen will also get quality merchandise and good presentation. I would not select the contract with one firm-I pick out one that I think will give my people the best service, also not crowd my screen with a bunch of trailers.

Q. What is your policy, the number of ads you permy to be shown in any one performance?

....We don't want any more than three.

Q. What is the total length of time that they consume?

A. They run about sixty feet at the rate of ninety feet a minute, about two minutes.

Q. Does MPA adhere to that policy?

A. Yes, sir, they do.

Q. Are you satisfied with the quality of film (that is displayed?

A. Yes, sir.

Q. Do they also adhere to your policy of not having conflicts at the same performance between the same form of businesses?

A. Yes, sir.

Q. You also say you have had experience in the past with an open policy?

A. Yes; sir.

Q. In the past, was there also a limit placed upon the number of ads that were permitted by the theatre?

A. Well, we like to limit them, but at times when we were being pressed by individuals, we considered as friends to our theatre and ourselves, a lot of times we would be more or less inclined to ake on advertising we didn't want.

Q. And in that case, did that result, you mean, in

more advertising than you wanted?

A. Yes, sir, it did, and irregular, some weeks you would have none and other weeks you would have six to seven.

Q. In making up your program for a theatre, where there is a repeat performance as there is in motion pictures, isn't it essential that you know the length of time of the whole performance, including the advertising?

A. Yes, sir, we make up schedules and have to adhere

to those.

Q. Two hours or two hours and fifty minutes, whatever it happens to run?

A. That is correct.

Q. So you will have a certain number of performances within a given time?

A. Yes, sir.
Q. What was the result, when you had the open policy,

about some weeks too few and some weeks there would be too many, in regard to the continuity of the performance?

A. Well, it would disturb your running schedule, of course; furthermore, sometimes you would have too many films, and you can put too much advertising on the screen, it is boresome to the public.

[1017] Q. (By Mr. ROSEN:). Mr. White, in the course of your business in the exhibiting end, are you familiar with the type and quality of film that was distributed by Mr. Reichart, when he was in the distributing business?

A. I don't believe I know Mr. Reichart.

Q. What about Mr. Ross?

A. Yes.

Q. You are?

A. Yes, I remember him, they were not as good films. Mr. Collins: I think I will object to that, now, let him tell the type of films it was, and let it to somebody else to judge whether or not they are just as good.

Mr. ROSEN: Who is going to judge it?

Mr. COLLINS: I submit that we have just as much right to judge it as you do, and I submit that we have to know what it is before anybody can judge it.

Q. All right, what type of film did Mr. Ross use in

his business?

A. He never used any colored film, it was more or less all tin-type, what we call tin-type production, it was not dressed up.

Q. Did it have any action?

A. It had very little, most of it just flat stuff.

Q. Would you show that type of stuff Mr.

[1018] Ross used, on your screens?

A. We were ferced to, sometime, they would come out there and make deals with local people, we didn't want it.

[1028] SAMUEL B. LANDRUM was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

- Q. TBy Mr. ROSEN:) Where do you live, Mr. Landrum?
 - A. I live in Dallas, Texas.

Q. What is your business?

- A. I am in the theatre business, I am with the Jefferson Amusement Company.
 - Q. Are you an officer of the company?

A. Vice-President.

Q. How many theatres does Jefferson Amusement Company own and operate?

A. Some seventy odd.

Q. Where are they located?

- A. They are located in East and Southeast Texas.
- Q. Are you the official of the company who handles the screening of the motion picture advertising on the screens of the Jefferson Amusement Company?

A. I handled it up until the time I moved to Beaumont, I mean, from Beaumont to Dallas, and at the present time, it is handled by myself and Mr. Oakley, the General Manager of the Company.

Q. How long have you been in the theatre business?

A. Since around 1939.

- Q. With whom does Jefferson Amusement Company have a contract to show screen advertising at the present time, and what is the term of the contract?
- A. As I recall, it is three years, I think the expiration date is probably next September, but I am not positive of that date.
 - Q. With whom did MPA negotiate the contract?

A. With me.

- Q. Prior to the time that you entered into that contract, was the Jefferson Amusement Company doing any motion picture advertising?
- A. Immediately prior to, no. We had a contract several years ago with Alexander, and Alexander had taken over from TAD and at the expiration of that contract there was a wartime scarcity of motion picture raw films and Alexander didn't want to renew on the

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basis I wanted to renew with him, so we tried handling our advertising for a short period of time, until the scarcity of raw product and the lack of per[1030] sonnel required us to go out of business, and we didn't have any screen advertising on our screens for approximately two years. Approximately half of that time I was negotiating with Mr. Mabry, he was an MPA representative, for a screen contract, also others.

Q. Can you give us the names?

A. One was a man named Reichart from Houston, also I talked to Alexander, and then a man named Carren from New Orleans.

Q. Commerce Pictures?

A. Yes.

Q. And all of them were trying to secure a contract with your company for motion picture advertising?

A. That is correct.

Q. Have you ever had a policy of having the screens open to more than one distributor at the same time?

A. No, sir,

Q. Why not?

A. Because—

Mr. Collins: I object to that.

Trial Examiner Kolb: The objection will be overruled.

A. It is a matter of convenience to me, I have a certain amount of space to sell on my screen, I have to control the number of ads that go on the screen, in order to balance that program, and I can better do that, it is

more convenient for me to have one person to deal with than several, or an open deal, so to

speak. The merchant who buys screen advertising, may buy it from the representative of some company specializing in that, but as a practical matter, they look to the theatre where their ad is going to show to get performance on the deal they make, so, consequently, we want to know that the person who handles our screen advertising is reliable, and will give those we deal with the kind of service he wants and keep him satisfied, and that can be done better by dealing with one individual

or one company than it can by dealing with an open field. Furthermore, if you have your screens open where anybody who sells screen advertising can sell an ad, then there is no way to control the number of ads going on that screen. I think the contract calls for a limit of 300 or 350 feet.

Now, there is a little additional space permitted where there is a national ad placed upon the screen.

Q. How long a time does 350 feet consume?

A. It is about ninety feet a minute, so you have a little less than four minutes of advertising. We don't have any advertising at all in two of our houses, and you have to keep that cut down because you have to be certain you are getting the quality of screen advertising that should go on the screen—in other words, if you don't, you have a laughable matter for the patrons if

you have some amateur acting on there as a [1032] screen ad, when that does occur we can have

that ad taken off of the screen.

Q. So one of the factors you take into consideration in awarding a contract to MPA is the type and quality

of the films they manufacture?

A. That is one thing; first, I knew they were responsible and they would give me the guarantee I wanted, and they were agreeable to the contract I wanted, after some lengthy negotiation. The contract is exclusive only in this respect, I had them to give Christmas Greeting trailers, which carries the name of any merchants we want to sell. I can carry it sponsored by my newsreels, I can put on specific contracts, which calls for one or two, or maybe more merchant, giveaways, whatever it calls for, I have never had any objection to that. During the recent months, I have run any number of merchants giveaways on our screens. That is merely a method of selling screen advertising under our arrangements, handling that locally.

Q. As to the term of the contract, length of time it runs, was there any negotiation between you and MPA

officials on that point?

A. Yes, sir, I wanted a five year contract and they wanted one year.

Why did you want it longer than one year?

A. Well, you make a one year contract to [1033] begin as of today, for instance, it takes them sometime to get merchants on the screen, and they don't start their ads on the same day. When they start, take over the contract, they started paying me for the screens, and it is difficult to get these things, all these contracts, to expire as of a given date. If the "X" drug stores ad runs over two or three weeks after the expiration date of the contract, I am certainly not going to have my theatre cut him off and incur his animosity, so a one year's contract is impracticable, it is like making a lease on a building for one year, or an office space. I wanted five years.

Why was it cut down to three?

That was a matter of five.

They didn't want it five?

No, sir, they wanted it on a one year contract because of the guarantee I was demanding.

You wanted five and they finally agreed to three?

Yes, sir. A.

You feel from your point of view that a one year contract would be impractical?

I feel it would be very impractical.

From your experience in handling motion picture advertising on your screen, would you consider a policy of having the screen serviced by more than one distributor at the same time.

Mr. Collins: I want to object to that, because the witness has testified he has had no experience along that line, that the only experience he has had is with the one company policy.

Trial Examiner KOLB: I think he stated he only dealt exclusively, and gave his reasons why. Don't go over the same ground again.

Mr. ROSEN: I will put the question differently.

Q. Would you do any screen-advertising at all if you were required to adopt an open policy?

A. I certainly doubt we would, it would be too hard to control. On an open policy, I am due no guarantee

by anybody that they won't furnish me with any given length of ads, I have so much space to sell, I am like the man with a billboard, I have so much space to sell and I want so much money for it, and if I can deal with the individual and get a guarantee, I feel reasonably certain they are going to do the best they can to fill those screens, and get the best ads they can to maintain their clientele. It assures me a certain amount of money for the space I have, and likewise it insures the merchant to get the best quality of advertising.

Q. Did I understand you to say one of the distributors who tried to get a contract was Mr. Reichart?

A. Yes, sir.

Q. Why didn't you enter into a contract?

[1035] A. Because he wouldn't give me the guarantee I wanted, I didn't feel that he had the facilities to serve the screens.

Mr. Collins: I object to that.

Trial Examiner KOLB: Overrule the objection.

Q. You may finish.

A: I didn't think he had the facilities. I looked at Mr. Currens' product. I didn't think it met the qualifications.

Q. Mr. Currens is the one connected with the Commerce pictures?

A. Yes, sir, he sent some of his samples of his advertising over to Beaumont.

Q. Didn't he have a test run there with you?

A. No, sir, I never put any on the screen for the public to see them.

Q. You mean he exhibited them?

A. He showed them to us on the screen.

Q. And it was subsequent to that time that you entered into a contract with MPA?

A. Yes.

Mr. ROSEN: Just answer Mr. Collins' question, now.

CROSS EXAMINATION

Q. (By Mr. Collins:) Mr. Landrum, if a distributor

had approached you and asked you how much space you had on your screen, could you not have told [1036] him how much space you had?

A. I don't know what you mean by how

much? You mean how many ads?

Q. Yes?

A. I cannot tell him exactly the number, all I can tell him is we don't want to put on there too many with any one program.

Q. But you could tell him how much space was taken

up, could you not?

A. I could get that from the theatre manager, I have no running record to show me exactly how many ads are running today on the screen.

Q. You haven't got that now, have you, because you

are dealing with one distributor?

A. That is correct.

Q. But you could put yourself in position to furnish that information, could you not?

A. Yes, sir, it would require some additional per-

sonnel.

Q. But you could inform a distributor how much space he could sell, that is, how much you would let him have if he could sell it, could you not?

A. I presume I could. You are talking about allocating a certain amount of space to the various screen

men, is that what you had in mind?

Q. No, I am just talking about the proposition if a distributor should come to you and ask you, "Mr. Landrum, I want to get out and sell some advertising. Do you have any space on your screen that we can buy from you?" Would you be in position to tell him?

A. I am pretty sure I would, if the decision required

it, I would get in position to tell him.

Q. And you could also require of the distributor to inform you of the length of his contracts with the advertiser, could you not?

A. Certainly, I would have to know that.

Q. And then you could also ascertain when the show-

ing of the film was to begin and when it was to end, couldn't you?

A. Yes. sir.

Q. And in that manner, you would be in position to know when your screens were filled and when your screens were not filled, would you not?

A. Yes.

So there is nothing about the business only bookkeeping?

A. Somebody else does that for me here, under my

system.

Q. Yes, you have now, under your contract; contracted with MPA to do that, haven't you?

A. Yes. sir.

Q. And there is nothing to prevent you from doing it yourself, is there?

No, sir, but I have a more economical [1038] method of doing it. They are keeping the records I would have to keep, and at the same time, they guarantee me so much money for my screens. If I want to put them out on the open market, I can't get the guarantee.

Q. But you can keep books and be in as good position to advise the other distributors what space is open, as

would he?

A. I don't know as I could, I don't know as I would be in as good position, because we are not geared to handle that particular thing, it would require.

Q. I am not speaking about the way you are geared-

Mr. ROSEN: Let him finish.

Q. I am speaking about, it is not impossible for you to do it?

A. No, sir, it is not impossible, it very definitely is not.

There is nothing to prevent you from saying what film ads will be shown on your screen and what film ads will not be shown on your screen, is there?

A. No. sir.

Q. Because you have always exercised that right?

I have always exercised that control and will continue to as long as we have screen advertising.

Q. How many ads do you have on your screen at any one time?

A. I don't think the footage is more than [1039] 350 feet under any circumstance, but I am speaking from memory, I haven't examined this contract in quite some time, but I think that is the footage permitted on national advertising. The rates differ as to national and local advertising, and I think the limit on local advertising is 300 feet.

Q. So do I understand you to say that there will be a limitation of 350 feet on National advertising, and

300 feet on local?

A. As I recall, that is the limitation.

Q. That is your best recollection?

A. Yes sir.

Q. Now, do you mean that they can—you can run 350 feet of national advertising and 300 feet of local advertising during the same performance?

A. I can say that I am safe in saying never in excess of 400 feet, I think it is less than that, but I think I will be safe in saying never in excess of 400 feet.

Q. Then do you know how many local ads that would-take care of?

A. Approximately four. Q. Approximately four?

A. Yes.

Q. Now, how many theatres did you say that you had?

A. I will say seventy odd.

Q. How many did I understand you to say you don't have any advertising in?

A. Two of them.

·· Q. So that would be approximately sixty-eight where you do?

A. Let me qualify that, there are two of them which MPA does not put any screen ads on at all, those two theatres I put screen ads on from time to time, such as Christmas trailers, or maybe a merchants giveaway, or something like that.

Q... All of the other are under contract with MPA?

A. That is correct.

Q. You said something about the guarantee, does MPA guarantee you a minimum amount?

A. Yes, sir, against a percentage.

Q. And if the MPA sells advertising over and above the minimum amount, you get a percentage?

A. Yes, sir.

Q. Now, are your screens always filled?

A. With only one or two exceptions, I think one of two small towns like Arp and Anahuac, where they have vacancies; but the managers in East Texas tell me they keep their screens pretty well filled.

Q. Well, that matter is handled through your Home

Office?

A. Yes, sir.

[1041] Q. Doesn't he, from time to time, render you an accounting?

A. Yes.

Q. On it?

A. Yes.

Q. To show you how many ads have been shown and how many have not?

A. Yes.

Q. And from that you are in position to know.

whether they are filled?

A. Oh, yes. I am pretty sure that they have been full because they have paid us an overage during the last year of the contract, and the minimum guarantee is enough they have to keep the thing pretty well filled to meet that.

[1043] EARNEST HUGH FORSYTHE was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Burgess:) Will you give your full name, Mr. Forsythe?

A. Earnest Hugh Forsythe.

Q. Where do you reside?

A. 601 - I mean 201 Burr Street, Houston.

Q In what business are you engaged?

A. Well, I guess you would call it theater co-owner or manager. Me and my wife own the theater.

Q. You are a theater owner and operator?

A. Yes, sir.

· Q. What is the name of that theater?

A. Don Gordon Theater.

Q. Where is it located?

[1044] A. 4719 Canal.

Q. In connection with your theater business do you handle screen advertising?

A. Yes, sir.

Q. Have you had occasion in the past to handle screen advertising for Theater Publicity Service?

A. Yes, sir,

Q. In connection with your handling of screen advertising for Theater Publicity Service, did you have occasion to handle a film for Martin Motors?

A. Yes, sir.

Q. Will you state what your experience was bin handling that film for Martin Motors with Theater Publicity Service?

Mr. Collins: Mr. Examiner, I think I want to object to that,

Trial Examiner Kolb: The objection will be over-

Q. You may answer the question, Mr. Forsythe.

A. Well, what I understand, that the ad was sold for twelve months and I run the ad about six or eight weeks, I don't know just exactly, and I was paid every week, and then I run it six weeks that I wasn't paid for and that is when I took it off of the screen, so I run the ad about thirteen or fourteen weeks, something like that. I will have to check the records to—

Q. What was your arrangement with Theater Publicity Service as to when they should pay you for screening?

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A. Well, the contract called to be paid, you know, on the first of the month but when I was running the ad they paid me every week. That is how come me to run it six weeks without trying to find out anything

about it because I figured they would pay me after it run a month, and I run it for six weeks and I still had not received any check for them or heard from them.

Q. Then what did you do?,

A. Then I called them and their phone was temporarily disconnected and I tried to find out what was the matter and I couldn't find out, so I took the ad off the screen.

Q. Did you ever put the ad back on the screen?

A. No. sir.

Q. Were you paid for the six weeks service that you had run?

A. . No, sir.

Q. You had been paid for the prior six or seven

A. Yes, sir.

Q. — at the beginning? Have you at any time been paid for the last six weeks that you ran it?

A. No, sir.

[1049] LUCIUS HENRY MCKIBBON was thereupon called as witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Burgess:) Will you state your full name?

A. Lucius Henry Mckibbon.

Q. Where do you reside, Mr. McKibbon?

A. 6636 Harrisburg Boulevard.

Q. Houston, Texas? A. Houston, Texas.

0. In what business are you engaged, Mr. McKibbon?

A. I am film manager.

Q. And for what theaters are you film manager?

A. I beg your pardon? Q. For what theater?

A. The Navaway Theater.

Q. Do you know a Mr. Ross, who was in the screen advertising business?

A. Yes, I do.

Q. In connection with the management of the Navaway Theater, do you run screen advertising? A. Yes, sir, I do.

Q. Over what period of time have you run screen ad-

vertising at the Navaway?

A. Well, that would be hard to answer. I have been at the Navaway Theater a little over a year. I was in the Boulevard Theater before that time and we have been running the screen advertising in the Navaway Theater since I have been over there.

Q. When you were at the Boulevard Theater, were

you manager there?

A. Yes, sir.

Q. And did you handle screen advertising at the Boulevard Theater?

· A. I did, yes, sir.

Q. And did you run any screen advertising for Mr. Ross?

A. Yes, sir.

Q. Will you give us his full name? My records don't show it at the moment.

A. Ross?

[1051] Q. Yes.

A. I couldn't tell you.

Q. Will you tell us what your experience was in running the theater screen advertising for Mr. Ross on the Boulevard Theater?

A. Well, I took the Boulevard Theater over and we had screen advertising and we ran it at that time for four different companies; Ross was one of them. Ross seemed to have the majority of the ads on the screen. One week we would have anywhere from fifteen to twenty minutes screen advertising. The next week we might drop back and have ten minutes of advertising and it was more or less a nuisance. People get restless. They booed. They came in to be entertained and you put on ten or fifteen minutes screen advertising and we had to cut the screen advertising out all together or boil it down to a point where it wouldn't be booed and at the same time we would get some revenue out of it, so Mr. Wilkins, the owner of the theater; and I got together and decided to cut part of it, out. Well, the screen advertising we

had been running for Ross and a man by the name of McGowen was more or less amateurish, it wasn't professional at all, and had no selling value as far as we could see and we were in the neighborhood with these merchants and we decided to chose between MPA and Alexander and run a number of ads on our screen.

After talking the thing over, Mr. Wilkins [1052] favored Alexander and I wrote Mr. Ross a letter and also MPA and Mr. McGowen telling them we were discontinuing the screen advertising, although if they had any contracts that had some time to run, we would go ahead and show them the courtesy of running the contracts until they expired. MPA wrote back and said they had one contract on my screen and had about nine months, I believe, to run. We ran that contract. Mr. McGowen said he had no contracts at all, it was sold on a weekly basis, and I couldn't get an answer at all from Mr. Ross. We waited, I guess, eight or ten weeks and couldn't get an answer from him, so Mr. Embry, I called him and asked what to do. They continued to send ads over each week and still had that ten or fifteen minutes of screen advertising 4 didn't want.

So Mr. Embry said, "Do you have any records of who

the merchants might be that Ross had sold?"

So I said, "Yes," and Mr. Embry came out and we called on these merchants one by one and I think we ran into one merchant who said he thought he had a contract. The rest of them said they had no contract at all with Mr. Ross and this one merchant said he thought he had a contract, but didn't know where it was, so the next films Mr. Ross brought over I refused to run, and that was about all there was to it. We just refused to run any more ads.

Q. You stated that you chose between the ads of a McGowen, MPA, Alexander, and Ross?
A. That is right.

Q. At that time. And you cut off the Ross and Mc-Gowen films because they were of an amateurish nature?

A. That is right, sir.

Q. And after that time you did business exclusively with Alexander?

A. That is right, sir.

Q. . And was that arrangement satisfactory to you?

A. Yes, sir, very satisfactory,

Q. What limitation did you place as to the number of ads that would be shown?

A. Four.

[1065] MAX A. CONNETT, was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Trial Examiner KOLB: Give your full name to the reporter.

The WITNESS: Max A. Connett.

Q. (By Mr. Rosen:) Where do you live, Mr. Connett?

A. At Newton, Mississippi.

Q. In what business are you engaged?

A. Exhibition of Motion pictures.

Q. Do you own any theatres?

A. I own seven.

Q. Where are they located?

A: Newton, Mississippi, is my headquarters, Forest, Mississippi, Bay Springs, Mississippi, Bude, Mississippi, Collins, Mississippi, Carthage, Mississippi, and Macon, Mississippi.

Q. Is it your policy to show any motion picture ad-

vertising on the screens of your theaters?

A. Yes, I do, and always have. It has been a nice source of revenue, especially during the depression.

Qy For how many years have you shown

[1066] motion picture advertising?

A. I have only been in the business since 1934, that is fourteen years, and I have shown com-

mercial advertising eyer since I started.

Q. Well, starting at the beginning; say fourteen years ago, what was your policy in displaying motion picture advertising on your screen? Did you have a contract with one motion picture distributor or several to show those films?

been down here signed a contract with any advertiser.

Even my agreement as to the price that I would receive for displaying that advertising has been a verbal agreement, and up until this year I have never signed a contract of any sort.

Q. Up until this year?

That is right.

Well, then, up until this year how many different distributors were there who displayed advertising films

on your screens?

A. Well, I more or less had the screen as an open screen, by that I mean I allowed all the distributors or the makers of commercial advertising to sell film in all of my towns catch as catch can. I had the Motion Picture Advertising Service out of New Orleans, I had the Alexander Film Service out of Colorado Springs, I had one or two smaller companies by the name of Town

Talkies, I think they later went to the name of Commercial Pictures, and I am not positive, but I think pernaps one other small company,

and I don't recall their name, came in and asked for the use of my screens, and I did just like I did the rest of them, I told them if they could sell it, I would run it.

Q. Explain for a moment, Mr. Connett, up to this year how that arrangement worked. What I mean is, explain for the record here how you would know what ads would be put on the screens, what price you would be paid, since you had a verbal arrangement with them,

and an open policy.

A. Well, to be right truthful about it, it was a little difficult in trying to remember the agreement I had made with the companies, and due to the way that I received pay for the ads that I did run on the screen, they usually came in thirty days after I had run the ads, and it was very difficult to keep records, rather, to keep the operator in the booth to keep records of what had run, when it had run, and more or less detailed reports and it was very unsatisfactory to me in trying to know just where I stood at any time I didn't. didn't know what I was hitting. Some companies at that time had what was called a national advertising trailer, I believe it was, which carried a different rate than my local advertisers and it was difficult for me to find out whether it was a national advertiser or a local advertiser or whether it had been put through for, we will say, a Chevrôlet Company locally, [1068] whether it was a national Chevrolet ad or whether it was a local Chevrolet ad, I never could figure that out, I never did know, and I know that I didn't receive payment lots of times for ads that I did run.

Q. Because, you mean, of the difficulty of keeping records on it?

A. It was just a job to keep books on it all the time and I just became disgusted with that type of operation.

Q. Well, what has been your policy with regard to the number of ads or the screen time allowed for advertising?

A. Well, I have never wanted more than six ads in any given week on my screen. That would be a maximum.

Q. When you say "week," you mean per performance?

A. I mean per performance, yes. I am speaking now that those ads usually run a week, that is what I meant. I wouldn't want more than six, I wouldn't have more than six. Even six is sometimes a little bit too many and unless you have a smart operator that knows how to splice them on to certain films and keep them separated a little bit, why, they become annoying to the public if you don't know how to put them on. I just wouldn't have more than six on the screen. Six is almost too many.

Q. And that policy of having six has been your policy for the past, says, fourteen years?

A. That is right.

Q. As a result of your dissatisfaction with the past method, that is, of having an open screen available to more than one motion picture advertising distributor, what have you now done?

A. Well, the past thirteen years, as I say, I let these salesmen, different salesmen and different companies

come and sell these theaters on a catch as catch car basis. If they happen to get to the Chevrolet man first, why, they sold the Chevrolet man. If they happen to get to the Coca-Cola man, they sold the Coca-Cola man, and as of this year, the early part of this year, it really started over two years ago, I became very disgusted with the different salesmen coming in and more or less crossing each other up selling these ads. I would get two drug store ads in one week, I would get two drink ads in one week, the result being that my own local orink distributor would complain bitterly that he was being handicapped by this other ad on the screen, and sometimes they sold merchants that I knew would not be able to pay, they may run two or three weeks and then they would come off the screens, which doesn't do the theater any good, either, so I decided that I would take one company, I would eliminate all bookkeeping, I would eliminate any double ads on the screen, like two drug stores, and I would get one film each week that my operator would know was coming and he would more or less look for it on a certain day of the week and he would take that film and he would cut it in two or. three pieces and splice it into certain parts of the program. I didn't particularly care how many was running

except I didn't want more than six to run, and

[1070] I just forget about screen advertising.

Now, that exclusive arrangement that I have, I asked for, I was not promised anything and I was not pressured into it, I asked for it because I wanted it myself to eliminate any of those little worries that I had had with screen advertising up to that time.

Q. When you asked for it, explain to me what you mean by that. Knowing what companies were in the

field, did you ask all of them or one of them?

A. I asked one company. I asked the company that I felt had done the best job for me in the past few years. I particularly became incensed at one or two representatives of companies that came in maybe once out of six or eight months and they would sell two or three ads and that would be the last time I would see them for another six or eight months and it wasn't a

satisfactory arrangement at all because at the best you have trouble with some of your merchants sometimes. Either an ad is late in coming and it isn't shown, or the ad may not be according to his liking that week, he may be getting washing machines advertised this week when he specifically requested irons, or something, so that the merchant himself becomes disgruntled, he would come to me and complain. Well, I can only talk to the salesman that sold that ad and if he doesn't come but once in six or eight months it is impossible for me to correct a situation like that. The company that I picked,

the salesmen work very hard at trying to keep customers satisfied. He comes in at least once

in every thirty days and I appreciate that from the standpoint that it saves me a lot of headaches and keeps all of my customers satisfied, because in a small town we have to live with those customers, they are more than a customer of ours, they are our neighbor and they have to be treated in a little special way, so I picked the company that I thought could do the best business and the best business for me. I also picked it from the standpoint of being assured of getting my money now and then, which I had a little difficulty in the past in some of them, some of the fly-by-night organizations that came up and tried to get into the field during the war, especially. I missed several checks.

Q. What is the name of the company you have concluded to do business with right now?

A. Motion Picture Advertising Service out of New Orleans.

- Q. Is that now a written contract or an oral arrangement?
 - A. That is a written contract.
 - Q. How long has it been in force?
 - A. Since January of this year.
- Q. What is the term of the contract, if you remember?
 - A. I think it is two years.
 - Q. Since January 1, 1948, when that arrangement

commenced, have you found that arrangement satisfactory, that is, doing business with one dis-[1072] tributor, rather than to have an open policy?

A. Yes. Yes, it is much better by far. Q. Would you go back to the old policy that you had

for the thirteen years?

A. I would not. If it would be impossible for me to sign a contract with any company and I would be wanting to do business on this same method I certainly would not allow except one company to come in and sell my towns. I feel that I keep my finger on the pulse of that a whole lot easier that way and it just eliminates so many little headaches that we have in the theater business, anyway.

Q. Mr. Connett, you spoke of finding in the past when you had an open policy salesmen might come in and sell two drug ads or two ads of competing businesses on your screen, and you found that unsatisfactory?

A. That is right.

Q. You did mention a moment ago that the merchant himself was dissatisfied?

A. That is right.

Q. When you spoke of the merchants, you mean, one

of those who had given the ad?

A. Well, those companies that come in, of course, don't know what the other company has sold and he may go to a drug store and say, "Well, I—"

Mr. Collins: Mr. Examiner, I want to ob-

[1073] ject to all of this speculation business.

Trial Examiner Kolb: I think that the witness is covering a matter which he has previously testified to. It is a matter of repetition. I will sustain the objection.

Mr. ROSEN: Well, what I was trying to do, Mr. Trial Examiner, is to have him explain, when he said that he was dissatisfied with having two of the same ads I was trying to get the reasons why.

Trial Examiner Kols: He has testified as to duplica-

tion of ads between merchants.

Q. You spoke a moment ago about the dissatisfaction of the merchants. What is the audience reaction to hav-

ing two similar ads where you have only six advertisements during the performance?

Mr. Collins: Mr. Examiner, I think I am going to object to that. I don't think it is material to the issues.

Trial Examiner KOLB: Well, the witness hasn't been qualified, but I think that he can testify as to the audience reaction, so let him answer.

A. Well, the audience, of course, are not too happy with screen advertising and they are not too happy with trailer advertising, previews of coming pictures. We have a lot of them get up and go out and smoke during those things and so anything we can do to elimi-

nate some of the ills of the commercial advertising or even the picture advertising, why, we try to do. I think one of the ills would be a duplication of drug ads or a duplication of washing machines, or a duplication of anything. Most certainly they should not be subjected to more than one type of advertising in any one performance or week.

NORMAN L. CARTER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

[1085] -Trial Examiner KOLB: Will you give your name to the reporter?

The WITNESS: Norman L. Carter.

(By Mr. Rosen:) Where do you live, Mr. Carter?

New Orleans, Louisiana.

With what company are you connected? Paramount-Richards Theaters, Incorporated. A.

In what capacity?

A. Assistant general manager:

How long have you been connected with that company or its predecessor?

Slightly over thirty years, sir.

Q. The business of Paramount-Richards Theaters, Incorporated, and its predecessor has always been in the exhibition of motion pictures, hasn't it?

A. Yes, sir.

Q. Owning and leasing the theaters and exhibiting the films upon the screens?

A. Yes, sir.

Q. During your thirty years' experience in that field how long has motion picture advertising been shown on the screens of the theaters with whigh you are affiliated?

A. From 1918, when I first went with the predecessor company, until the second World War, with the [1086] exception of probably intermittent lapses in between negotiations of contracts. I would say it was continuous.

Q. How many theaters are presently operated by Paramount-Richards Theaters, Incorporated?

A. Sixty-six.

Q. What has been the policy of your company since 1918 until, you say, the second World War began with regard to the display of motion picture advertising from the standpoint of your contracts with the distributors, that is, whether you had an open policy on the screen, or one in which only one distributor was permitted to show advertising films?

A. I will frame it this way: While we have negotiated with one or two companies, we have never had any

contract except an exclusive one.

Q. So that it has been the consistent policy of your company when it displayed motion picture advertising to have an exclusive theater screen agreement with one distributor?

A. That is correct.

Q. What are the reasons that motivated your company in adopting that policy?

Mr. Collins: I want to object to that, Mr. Examiner. I submit that the reasons for the theaters adopting that policy are not material to the issues.

Trial Examiner Kolb: The objection will be overruled.

A. Well, of course, there are some practical objections which we don't consider to be ones that we can't get over, being the splicing of screen ads of small spools from different advertising

agents, which at times causes confusion in putting it together and shipping, but that is a minor thing. The big problem which Mr. Connett mentioned never worried us to any extent because our billing was always through our home office in New Orleans, but being a circuit, we have to consider ourselves as a foreign corporation operating in towns where our managers, with very, very few exceptions, came from outside of the town, they were not native, so in the vernacular they were to them foreigners and therefore in the conduct of our business we had to always give a great deal of thought to creating goodwill for our company. As to the confusion in selling where you have competing companies with the privilege of selling your screen to advertisers, both will sell in the same category on the same day, both think they are sold and you have got to turn one merchant down and say, "I am sorry, but the Jones Drug Store got in first," and you have made an enemy and we being an out-of-town company can't make enemies when we are in that situation. We don't have the advantages of the home town operator who operates his own theater. That, of course, is not so important, but it has a cumulative effect with other objections. In doing business with one company we, of course, limit the categories to whom they may sell.

Q. You mean the character of the advertis-

A. The character of the business. We eliminate advertising of beer, whiskey, of course, wines are out, mortuary establishments we restrict entirely, but we have to look at it from this viewpoint: There is a great deal of resentment by the public because they feel that we are taking up time for which they have paid to be entertained. Our policy for years has been not to permit screen advertising in our principal theaters. When I say principal theaters, I mean theaters like the Saenger in New Orleans, the Saenger in Mobile, the Saenger in Pensacola, the Strand in Shreveport, the Hart in Baton Rouge, the Paramount in Jackson. Those theaters take the top admission price on our circuit in this territory. Our commitments with the screen ad-

vertising companies do not include screen time in those theaters. In the theaters where we are charging a lesser admission, we feel that there would be less resentment to it and as the town is smaller we would use screen advertising and have used it in what we term the "A" theater, the Paramount in Greenville, it is a small community and most everybody knows the Mr. Jones who runs the drug store. Our feeling has been that if we can take one company and have them follow the restricted categories that we give them, knowing that they will have a number of certain, definite situations that they can sell these categories, and we try to tell the heads of that company what we feel to be the best merchant and to get that account, if they can, that if they

have that, without coming in and trying to [1089] sell quickly from a library, they are then able to make a better film that ultimatel will be developed into entertainment rather than simply the old stock shot to which you put a couple of frames at the bottom, and it was the Red Star Grocery, for we believe that the public is entitled to a break if we are going to get money by the fact that they are there, because attendance in the theater is the same thing as circulation for a newspaper, so if we are going to get money for it, we felt that we should do what we could to improve the quality and the narrative of an advertising film, and if we permitted the policy of cutthroat selling between salesmen we wouldn't get that. It gave an opportunity to produce a better advertising film.

Q. When you had contracts for screen advertising, was there any guarantee in those contracts to you of a minimum amount irrespective of the number of ads. displayed?

A. As I recall it, we had a guarantee of four. We limited the number to six. As I recall our agreements, we were guaranteed four in every theater in which we had contracts.

Q. Your Company insisted upon having a minimum guarantee before you would enter into the contract, didn't you?

A. Yes.

Q. Would it be possible to obtain any guarantee from any distributor unless he had the screen exclusively? Mr. Collins: I want to object to that.

Trial Examiner KOLB: The objection will be

[1090] sustained.

Q. You have given, Mr. Carter, several reasons why your company adopted the policy of doing business with one distributor. Was the question of remuneration to you one of the factors that motivated you in adopting that policy?

A. Certainly. We have to select a company which

we think would secure-

Mr. Collins: I want to object to all of that narrative. He has answered the question.

Trial Examiner Kolb: The objection will be sustained as to the latter part of the statement.

Mr. ROSEN: If the Trial Examiner please, don't you think the witness has a right to—

Trial Examiner Kolb: He was asked whether or not remuneration was a matter which he took into consideration in negotiating the contract and he said "Certainly," or "Yes." The question has been answered.

Q. At the present time and since about the commencement of the second World War, your company does not display screen advertising?

A. That is correct.

Mr. ROSEN: That is all I have.

CROSS EXAMINATION.

[1091] Q. (By Mr. COLLINS:) Do I understand that, Mr. Carter, since the beginning of the second World War none of your theaters carry screen advertising?

A. That is correct, sir.

Mr. Examiner, I would like to make a statement with regard to that. Just baldly, it doesn't sound so good. Through the War Activities Committee of the industry, who had offices in Washington, we were receiving so many films from the various Government agencies, conservation of fat, recruiting films, and all the services

and all the different agencies of the Government, which in time of war we could not refuse to run. That was our pledge to the President, President Roosevelt, through our national organization. Of course, during war periods, there was a tremenduous amount of business in all theatres so that the income which we derived from screen advertising was not necessary. The difference was made up in the volume of admissions and we felt that we had enough on the screen without inflicting the patrons with the addition of screen advertising.

The delay at present in getting back to screen advertising in those that aters in which we had been running it is due to the fact that we feel a definite change in the character of the screen advertising film is going to take place and we think that that is going to develop into something along different lines. Just exactly what

it is going to be, we don't know. We have [1092] seen one or two ads, one was made for United Fruit in color cartoon, and it may be a different thing, one main tobacco line, and the revenue which you get is based upon the number of people that see it, it is a different guarantee arrangement, so we have preferred to wait. I didn't want you to get the impression we had discarded screen advertising entirely.

Q. You never did permit it in your principal thea-

ters, did you, Mr. Carter?

A. I don't think we did. There may have been one or two of the towns outside of New Orleans where for a short period they may have, but we eliminated that. In the last contract that we had I am positive that our five or six principal theaters in the larger towns did not run screen advertising.

Q. Your reason for that was the audience reaction

to the advertising films, was it not?

A. Well, we got a higher admission in the bigger theaters and we tried to frame a program with some art to it, doing it. It is what we call our show case in town, in the big town, and we think that a program of screen ads might be somewhat of a jolt thrown in there.

Q. Now, you used a term while ago, Mr. Carter, that is a little bit new to this proceeding up to this date and

that is that you said that you didn't want to inflict that on the public, on your customers.

A. Yes, because they certainly had enough with all of the film that the Government was

giving us, they had sufficient. They came in to be entertained and we are not going to take any more minutes away from them, because that three minutes seems like thirty.

Q. And you do consider it more or less of an infliction on the audience, this screen advertising, don't you, Mr. Carter?

A. Well, we can certainly get that from the resentment of a great many people who complain about it, but that was why in my remarks in explaining the bald statement that we were not using it and the reason why we go for one company is that we feel that they can make a better film and get the advertising into the entertainment field and that is one of our reasons for sticking with a single company and making an exclusive contract.

Q. You haven't dealt with that company since the

beginning of the war?

A. Correct, because I stated we felt that we didn't need the money from screen advertising, the wartime business made up all we needed. You know, we could make up to a certain point of money.

Q. And the picture with reference to the bananas didn't come about before the second World War, did it?

A. No, sir. Get my statement, I said that the banana advertisement is new. I think it has been out probably a year. We have seen it. I have looked at it several times. Tobacco Land is about six months old.

It is a new form of screen advertising and it is very entertaining, which I must admit some of the stock shots and the regular screen ad-

of the stock shots and the regular screen advertising is not, and is a different method of payment entirely.

Q. Up until the first of the last war there were no such screen ads as that in existence, were there?

A. I believe that some of the motor companies and one of the cigarette companies had put out some film in color which were longer than the average advertising

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unit, as we call it. They probably ran a minute. We did not run those. We could have received more, but we did not run them. We stuck to the six units, not to exceed fifty feet, including all leaders.

Q. You are acquainted with what are called library films, are you not, Mr. Carter?

A: Yes.

Q. Weren't most of the advertising films before the beginning of the second World War what are known as library films?

A. I think that is correct. I think that is correct, but better library film has been made and it was made

before the second World War.

Q. Pardon me?

A. Better library film, we call them stock, better ones had been made. I do know that MPA made a complete revision of library stock before our last contract.

Mr. COLLINS: I believe that is all.

[1096] WALTER SAUSSY: was thereupon called as a witness on behalf of the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Trial Examiner Kolb: Give us your name. The Witness: Walter Saussy.

- Q. (By Mr. Rosen:) Where do you live, Mr. Saussy?
- A. New Orleans.

Q. What is your business?

- A. I operate an advertising agency which is an agent between two principals. We represent the advertiser and we place business with the medium. We are allowed a commission by the medium by being a recognized agent. We are appointed by the advertiser to serve his account.
- Q. How long have you been engaged in the advertising business?
 - A. Since 1928.
 - Q. What is the name of your agency?

A. Walter Saussy Advertising.

Q. Will you give us the names of a few of the most important advertisers?

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A. Currently, the American Brewing Com[1097] pany, producers of Regal Beer; the William
B. Reily Company, roasters of Louisiana Coffee;
the Elmer Candy Company; D. H. Holmes, the department store here; I have served the Standard Oil Company of New Jersey, I have served the Ford Motor Company. I am associated with Maxon, Incorporated, of Detroit, a national advertising agency, and I was formerly associated with McCam-Erickson, Incorporated, serving those two agents as their southern office.

Q. McCam-Erickson is one of the largest advertising

agencies in the United States?

A. I think McCam-Erickson is the fourth largest and Maxon would come into, probably tenth.

Q. What are the different media that you have used

for your clients in advertising?

A. We use in the advertising business organized established medias. Primarily it is radio advertising, newspaper advertising, and outdoor advertising, all of which are organized and integrated together. We also use motion picture advertising, however. It is a minor one of the medias. It is not considered a major media.

Q. You didn't say magazines?

A. Yes, we use magazines. I use very little magazines because of my sectional business, see. I do some magazine advertising but because of my sectional business, it is a small part of my business.

Q. Now, you have said that motion picture advertising is one of the minor media for advertising. Could you give us from your own experience just an estimate of the figures on that? When you say it is minor, about what proportion of the appropriation that the advertiser gives you do you spend in motion picture advertising?

A. Well, to answer your question, I will try to arswer it more on the national basis. Of the total advertising dollar I doubt if motion pictures—this is an estimate—would amount to more than three or four percent of the total advertising dollar because of the limited

space. If they could accommodate more advertisers it would be a bigger media, and if it was better organized it would be a bigger media, but they can only show four or five spaces, admit four or five spaces to the screen during the showing of one film. Therefore, it is extremely limited. The others, the newspapers can accept in their pages—they have forty-six pages of newspaper, the Sunday section you are familiar with, it is big, radio, of course, has a limit, too, outdoor has a limit, the magazines don't have the limits that the others have.

Q. From your knowledge of the dusiness, what proportion of the newspaper space is devoted to advertising compared with reading matter?

A. That proportion is increased due to the news print shortage. Now, it will reach as high as up to eighty per cent.

[1099] Q. In normal times when there is not a shortage of news print, what will it run?

A. Approximately sixty per cent, forty per cent news or service to the public, and about sixty per cent paid advertising space.

Q. What about magazines?

A. That runs pretty near the same proportion.

Q. What about radio?

A. Radio has the problem there, they cannot crowd, radio people won't listen to the radio if it is all advertising any more than they would look at a motion picture screen if it was all advertising. We are permitted by the networks—and we usually use it all—a two minute to three minute commercial in a fifteen minute program. We make three one minute announcements to identify the product and to advertise the product, so I would say up to twenty per cent.

Q. And how does that compare, those mediums you have spoken of, with motion picture advertising, that is to say, what proportion of the total motion picture pro-

gram is devoted to advertising?

A. Well, it has been my experience that if they show more than four or five motion picture advertising films, which are limited to about fifty seconds to one minute,

the average time, we call them in the trade minute movies, you can't use but about five with every feature.

If a feature went three hours-

[1100] Q. Say two hours.

A. Well, two hours, one hundred twenty minutes, and you are permitted to use five of those minutes, it would be about four per cent, sir.

Q. Have you in your business used motion picture

advertising for your clients?

A. I think I have been one of the largest of the southern agencies to use motion picture advertising, yes, sir. I have used it extensively.

Q. What factors do you take into consideration before devoting any of your clients' money to motion picture advertising, or, for that matter, any advertising?

A. Well, number one, I cannot handle any advertising that can't be planned in advance. The point where advertising leaves off and selling takes on is a point that you can barely distinguish. The two have to be fully coordinated, so that the primary thing to me is to be able to plan in advance, to be able to get all the value out of the advertising, and you can only do that by full coordination through—the term merchandising is used in our trade, to merchandise the advertising—through the sales organization to the consumer, and so that we can plan in advance and be assured of space we contract in advance. In some cases it is necessary to give non-cancellable contracts in order that the medium might

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be assured that the advertiser is going to use it and we are assured of the space, so we very often enter into bidding contracts in which we

make a non-cancellable exclusive agreement.

Now, in motion picture advertising up until the last, say, eight years, I never used motion picture advertising. It is only since it has been organized, it is only since they have published rate books, it is only since they have given us assurance that we can get a schedule. In serving the Ford Motor Company and the American Browery, I have used, I have had the largest use of motion picture advertising. In the case of Ford it has much the largest use. Well, for a while I couldn't in-

terest the Ford Motor Company because I couldn't assure them of any space. They would give me releases, a schedule of advertising, and when I went to try to place it at least eighty per cent of the dealers were unable to get it because the theaters cannot accept more than four or five spaces at a time, so I would say the biggest single factor is to be assured of space.

Q. Have you ever made any efforts on your own part to go direct to the theaters in order to display your

client's advertising?

A. Yes. I have obtained in the City of New Orleans an exclusive arrangement with the theaters for Regal Beer and h wouldn't have bought that space in the negro theaters had I not been assured of being the first beer to buy.

[1102] Now, there is another big factor in motion picture advertising, unlike the other mediums. If I am going to run newspaper advertising it costs me about \$150.00/ to \$200.00 to produce the master ad that is duplicated in all newspapers on the list. In order to use motion picture advertising, it can cost up to \$2,000.00 to produce the single master for a one minute movie and then that has to be duplicated.

Now, unless I am assured of a sufficient number of butlets in which to run that so that I can charge off the cost, I am prohibited from producing something that will please the public.

- Q. Now, getting back a moment, Mr. Saussy, to the question of the advertising agency like yourself going direct to the theatre in order to contract for space, you say you have done that locally?
 - A. Yes, sir.

Q. Would it be practical for you to do that yourself with the exhibitor in a number of cases, if you needed—

A. Not beyond the very local field. In the case of Ford, had I been required to do that to be assured of space, the cost would have been prohibitive. I couldn't even have considered it. It would have cost me more than my fifteen per cent commission, which is the maximum that I am allowed by the medium to even arrange the schedule. It would be prohibitive.

Q. Well, therefore, if you had to go out and yourself get the license from the theater to exhibit advertising in the theaters you wanted, would you use the motion picture medium for your advertiser?

A. Definitely not. I didn't. When those conditions existed I did not use them. They did exist at one time.

Q. What is the only way that you find it practical to use motion picture advertising as one of the media for your clients?

A. Well, first, I have got to be assured of having some representative that understands the medium representing the theaters. That representative must have under contract a sufficient number of theaters to be able to guarantee me enough space to make it practical for me to produce a film. That is number one. Number two, I have to be assured of a source of producing a good film, one that won't bore the public but will please the public.

Q. Are you familiar with the so-called library or syndicated films that are produced by the leading motion

picture distributors?

A. Yes, sir.

Q. Have you on occasions used those films for your clients?

A. It is the only service that I have available. I couldn't use the service in some cases if it wasn't for the existence of those libraries. It would be pro[1104], hibitive.

Q. Have you also had experience having displayed for your clients special films that are produced

especially for that advertiser?

A. We always produce and prefer to produce a special film. The companies that produce the library films only produce them as an expedient to serve business. Now, where we can—you see, library service is not just common to motion pictures, in the field of outdoor, there is some library service for posters, there is some library service for newspaper ads, but, of course, you don't have an advertising unit built independently for the product,

you are using the best thing that is available, so normally we produce where we can. In the case of Ford and Regal Beer we produce exclusive films.

Q. Who does that work for you, the producing?

A. It is done by different contractors. Sometimes the motion picture distributors themselves have services that they use to build their library service, will contract with them, sometimes we will contract with individual producers in Hollywood, in Detroit, but that is done on a separate contractual basis.

Q. Have you ever done any business with Motion Picture Advertising Service Company, Inc., of New Or-

leans?

A. Yes.

Q. Both with regard to using their library film and also special films that are produced for the particular advertises?

[1105] A. Yes. I have used the library and I have had them act as my agent to help produce films, and I have also had films produced by outside agents.

Q. Have they ever refused to exhibit for you/special advertising films that are produced by other companies

than themselves?

A. No. On the contrary, they have urged me to produce my own films. They have urged me to ask clients, to encourage clients—as a matter of fact, the one thing holding the industry back is the absence of films of very high quality produced by the individual clients themselves, so they have encouraged us in the agency field to get our clients to produce their own films. They wouldn't be in that business if they could get out of it, in the business of producing the films.

Mr. COLLINS: Mr. Examiner, I think I want to object to that, and I move to strike it. Now this man is testifying about whether or not another company would be in the business if they could get out of doing certain

things.

Trial Examiner Kolb: We will let the answer stand. Q. Mr. Saussy, are you familiar with the concern known as Commerce Picture Service?

A. Yes.

Q. Have you ever used films produced by them?

A. I couldn't say that I have. I may have. I am familiar with them. I am familiar with the service and I think I have, but I would have to go to

my records to be able to say definitely.

Well, I asked you whether or not you had used films produced by them. Have you ever used the films that they use in connection with their service, whether

they produced them or not?

A. That question I would have to refer to my records on. If they produced any of the Ford films—I have used films produced by Alexander Film Company. I have used films produced by Motion Picture Advertising Service, I have used films produced by Harry McMann in California and I have used films produced by a firm in Detroit under the sponsorship of J. Walter Thompson, Advertising.

Q. Have you ever seen a demonstration by Commerce

Pictures of their films?

A. Yes. I am thoroughly familiar with the service.

Q. How does the service used by Commerce Pictures compare with the service of Motion Picture Advertising Service, Inc.?

Mr. Collins: I want to object to that.

Trial Examiner Kolb: The objection will be overruled.

Mr. Collins: Mr. Examiner, I submit that it isn't a question here of the comparison of any one, two, three, or more motion picture concerns. There is no issue in

this case of a comparison between the motion

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[1107] picture concerns.

Trial Examiner Kolb: Well, to the extent that the respondents have based their defense on the ground that the type or the quality of the film is undesirable and is not used for that reason—that is why I am permitting the witness to testify to that.

Q. Just so you understand my question, Mr. Saussy, when you make a comparison I want to know as to type and quality, in other words, how do they compare?

A. Well, I would compare quality of films—the films

of Commerce Pictures that, I have viewed have been poor in quality, the films of the Motion Picture Advertising Service have been from poor to excellent. The best films that I have ever viewed are the films produced by independent producers under the direction of the advertising agencies serving the accounts and separated completely from the motion picture advertising distributors.

Q. And that is why you prefer to use specially made films rather than the usual library service?

A. That is the reason we exist. We are an agent between two principals. It is my job to produce the production. The advertisement I create, and I am supposed to create it through independent sources. I do it. None of the magazines produce the ads that are produced in the magazines. The radio stations don't create the shows

that go on the air. The newspapers do not make up the ads. I am the agent that does that and in the field of motion picture advertising it will never reach its full realization until there is a much, much higher quality of production by inde-

pendent producers.

Q. Would you consider the use of this medium for your clients if the motion picture distributor did not have definite contracts with theaters permitting them to exhibit the films?

Mr. Collins: I object to that.

Trial Examiner Kolb: The objection will be susstained. The witness has answered that question pre-The witness has already testified that he has to have his outlets in order to place his advertising. That answers the question you are asking now.

Mr. Rosen: Just answer Mr. Collins' questions on

cross examination.

CROSS EXAMINATION

Q. (By Mr. Collins:) Mr. Saussy, you say the best quality films are produced by producers who are not connected with distributors?

A. Yes. sir

Q. That is, the best quality films are available to all distributors?

A. Yes, sir.

Q. Now, you talk about a guaranteed space, Mr. Saussy. Are you assured at all times that you can get your advertising screened at the time that you

[1109] want it screened?

A. No, sir. The limits of showing from four to five films at one time where it is limited to only five exhibitors means that only those that will guarantee to use the medium on a regular schedule are able to get space. The same is true in radio. Unless I agree to take a space on the radio and use it fifty-two times a year, each week, at that time, I am not assured of that space. I have to contract for it and so if I have that space I have prior right to it and I hold on to it as long as I want to use it.

Q. Don't you find at times that a space on a screen

that you want is filled?

A. Why, of course, because there is a limit to the number—

Q. And before you can assure your client of the space that is available you have to check, do you not with the distributor?

A. Yes, sir.

Q. But you know in advance the price which you will have to pay, do you not?

A. Yes, sir.

Q. You know that through the use of these rate books?

A. Yes, sir. The rates vary.

Q. That is, vary with the different theaters, do they?

A. With the different theaters and there

are increases from time to time per theater and we have to have a central unit through which we can gather that information.

Q. Now, you don't do any local advertising, do you? What I mean by that, for a local concern, like arranging for advertising in just one theater?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. Now, isn't it possible for you to do that local advertising without the use of the distributor with an exclusive contract?

A. In the City of New Orleans, as an agent in the City of New Orleans, yes, it would be possible for me to go to a theater and make an individual contract with that theater to exhibit a film that I have produced, but it wouldn't be possible for me to arrange a schedule over an area and, of course, while we do serve some local business I couldn't exist as an agent unless I could win clients that have enough business spread out over an area to maintain my organization.

Now, you are somewhat familiar, are you not, with the cost of the production of these advertising films?

A. Yes, sir.

Q. And would it be possible for a local merchant to have special films made up every time he decided to use motion picture advertising?

A. How many theaters would he use, sir?

[1111] Q. Well, in a small town, say.

Q. Do you think he could?

A. One theater in a small town?

Q. Yes.

A. No, he couldn't produce his film exclusively for use in that theater.

Q. How many theaters would you think that it would be necessary for him to use before it would justify him to have special films made up?

A. Well, I would estimate—this will have to be an estimate, sir—if the film was produced in quality so as to please the audience and not do injury to the theater owner through its exhibition, that it would cost him not less than \$200.00 to produce a single film, and that would be prohibitive if that film was only exhibited once. Now, it is our custom to repeat films at least twice, come back at a later date and repeat a film, so it would require him to produce approximately 25 films a year to maintain continual showing every week in the theater and

that would make it prohibitive. I believe. It would cost him from \$3,000 to \$5,000 to produce his films.

Q. And then you would not only have the cost of production of the film but he would also have the cost of the screening?

A.) Yes. To course, the cost of the screening wouldn't enter into whether he would use it or not, because that would be the same whether he was using a large number of theaters or just that one theater.

O. And just the common ordinary run of drug stores and the common ordinary run of garages couldn't use that kind of advertising profitably, could it?

A. That is right, sir.

Mr. COLLINS: I believe that is all.

CARL J. MABRY was thereupon called as a witness for the Respondent, Motion Picture Advertising Service Company, Inc., and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Rosen:) Mr. Mabry, you have previously testified in this case, have you not?

. A. Yes, sir.

Q. And have given testimony with regard to the terms of the contracts that you make with theaters?

A. Yes, sir.

Q. Would it be practical for Motion Picture Advertising Service Company, Inc., to obtain contracts for the limited time of one year?

A. No, it would not. It would not be practical for a number of reasons. Do you want me to give them?

Q. Would you state for us what the necessities of the case are, that is, how long a contract should be in order to make it a practical operation, and your reasons for your statement?

A. Well, in the first place, you couldn't attract capital if you didn't have longer term contracts than one year. I wouldn't invest my money in a company where I could

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hold out a market for only one year. You couldn't attract employees, worthwhile employees, if you could hold out a future of only one year. You couldn't attract salesmen in a territory to change from, we will say, one selling job to our saling job if we could assure them of only one year. You couldn't borrow money from the bank if you told them, "Well, I have a one year market." You couldn't afford to invest in equipment. For example, sound equipment alone cost us in the neighborhood of \$40,000,000. We certainly couldn't afford to make an investment like that in just one piece of equipment if we had assurance of using that for such a limited time, We couldn't afford to invest money in opening territories if we were assured of only one year in that territory.

- Q. What do you mean by opening ter-[1114] ritories? Explain that a little bit.
- A. Well, for example, up until about three months ago we didn't operate in the State of Arizona. We have spent no less than \$2500.00 to \$3000.00 in traveling expenses sending a man back and forth to sign up theaters there. We couldn't afford to have made that expenditure if we had been assured of only one year agreements. I feel that the only sound policy is to work to the end of having at least three or four or five year contracts with theatres.
- Q. What are the contracts that your company has averaged as to their term?
- A. They average about three years at the present time. The fact is, half of them are three to five fears, and the other half, I believe, are less than three years. They average about three years, but we work to get five year contracts where no guarantee is involved. If a guarantee is involved, then we sometimes have to limit that because we don't want to take the risk.
- Q. In those cases what would you say the term would be, with the guarantee?
- A. Usually we try to get three years, two to three years.
 - Q. Quite apart from the investment that is necessary

for you to make in building up the territory and traveling expenses and the other items you have just [1115] testified to, would you give us for the record here an analysis of how the time works when you get a screening agreement and then have to play that out. I wish you would break that down for us and show us the practical operation of that.

A. Well, if we get a screening agreement from a theater or certain theaters that are already running ads for some other company, that screen isn't really fully available to us until 14 to 15 months after we make the contract.

Q. Why so?

A. Because in all contracts the theater must agree to run to complet in the advertisers' contracts that you sell during the time of your agreement with him. Now, most advertisers' contracts are written for a year either every week or on an every other, weeks schedule. Say, for example, we take over—to be specific, we will take certain theaters in Arizona that we just acquired, there is another film company that had had those theaters. The theaters furnish us a list of advertisers that are already sold by the other film company.

Q. Before the expiration of their contract?

A. Before the expiration. That shows that during the first six months of that contract we will have available to us less than 25 per cent of the space that we have bought from those theaters. It will be a year, it will be a little over a year, probably 14 to 15 months, before we get all of the space we bought, so we couldn't afford to make a one year deal with that theater and [1116] from a practical standpoint send salesmen out there and make the other additional investment which is required. We couldn't afford to increase our

library to take care of that additional territory on a one year deal because we wouldn't be assured of getting the usage out of the films that is necessary in order to recover the cost. You see, we produce a library service and we have to stand the expense of producing that

service. Now, unless we are assured of a certain outlet on those films or a certain amount of usage on those films, we couldn't afford to produce them.

- Q. Well, you say that most of the advertising contracts are made for a year, either to run every week or every other week?
 - A. Every week or every other week schedule.
- Q. Is it possible in those cases to display the advertisind exactly over the term of the advertiser's contract, what I mean is, does it take longer than a year to display advertising where the advertiser's contract calls for a year's run once a week for 52 weeks?
- A. No. On a library service it takes about 60 days to get the advertiser's contract started, which means that it would take 14 to 15 months to complete his deal. On a special film service where you have got to produce special films for the advertiser it might be from six months or maybe even a year after you sign the advertiser up before you could actually start him.
- [1117] Q. And in the case of a special film, if it called for 52 weeks and you had a special film it might take, say, something over 18 months, you mean, to run?
 - A. Eighteen months to two years.
- Q. What I was asking you was this: Even in the case where it called for one display each week for 52 weeks of a syndicated film, doesn't that advertiser in some cases have to wait his turn to get on the screen if you are already filled up, so that you can't actually run that out right from the minute of the contract for the next 52 weeks?
- A. No, unless he enters into that agreement. We control that to a certain extent by not letting our salesmen sell space that isn't available.
 - Q. Is it the custom of most advertisers to have followup or repeat advertising campaigns once the first contract is expired?
 - A. I don' think, Mr. Rosen, you could interest any worthwhile advertiser in the use of a medium unless you

could give that advertiser some assurance that he is going to be able to continue.

[1118] CROSS EXAMINATION

Q. (By Mr. Collins:) Mr. Mabry, when you take a contract with a theater and another distributor has advertising arrangements with the theater to screen advertising films it is understood that the theater will screen those advertisements out to the extent of the agreement, isn't it, to the time limit of the agreement?

A. Do I understand you to mean that when I acquire a theater do I have in my agreement with that theater provision whereby that theater can run to completion

advertisers' contracts that are already sold?

Q. Yes.

A. Yes, sir.

Q. Now, you have had arrangements with theaters for screening advertisements and some other distributor has taken that theater away from you or signed an exclusive contract with them, haven't you had that experience?

A. Yes, sir.

Q. Now, when you have that experience do they continue to run the advertisements that you have out to

completion? .

A. To a degree. Some of them will run them out for 12 months and others will have a run out period of only 60 or 90 days. During recent years there has been a tendency on the part of theaters to limit that run out period. My company has fought it very severely and we have been able to control it to an extent and get the theater to back up our agreement with the advertiser, but I find that in some cases the theater seems to have sold the other film company rather than the [1120] film distributor selling the theater because they

film distributor selling the theater, because they have only 60 to a 20 day run out.

Q. But you have followed the policy of running out the ads to the completion of the contract?

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say,

A. Yes, sir. We don't attempt to stand in the way of a theater completing an advertiser's contract.

Q. Now, when you get a contract with a theater do you wait about selling advertisements until all the adver-

tisements have run to completion?

A. No, sir. We wait until the other film company's selling privileges expire. In other words, we will not permit ourselves to go in and be selling in that town in competition with the other film company that might have been serving the advertisers or serving that territory, because it would cause too much confusion in the minds of the advertiser and would do the industry more harm than good.

Q. Well, now, you said something there about the other distributors' selling period had expired. When does

the selling period expire?

A. It expires when the contract expires, when the theater contract expires. Say, for example, a theater makes a contract for one year starting January first and expiring December thirty-first, the company holding that contract can sell right on up to December thirty-first.

Q. And that is the practice throughout, is

A. That is the practice throughout, but it is, with the trend that I mentioned to you a few moments ago of theaters attempting to limit the run out period, a very dangerous practice to continue to sell right up to the end of the contract because it takes you anywhere from 60 days to maybe six months or longer to service an advertiser's contract, so your servicing privileges on the theater might have expired before you actually got the advertiser on the screen.

Q. So your contract with the theater, then, really refers more to the selling period than it does to the

screening period, doesn't it?

A. To an extent. It all depends on the run out that the theater allows. If the theater allows you a run out period of 60 days then the two of them about run concurrently, but if he allows you a run out period of, say, a year, which we encourage because we naturally

want to sell contracts right up to the end of our contract, then the servicing period might run a year beyond the expiration of the agreement.

Q. And are those run out periods set forth in your screening agreement?

A. Yes, sir.

Q. And, of course, the run out period would be governed by that.

Now, Mr. Mabry, what percentage of your contracts would you say have a run out period of 60 days?

A. Ours?

[1122] Q. Yes.

A. In our case it wouldn't amount to even a fraction of 1 per cent. Practically all ours have an unlimited run out. We put that in there, anything we sell within the term of the contract, but the theater owner knows that we take only one year contracts with advertisers so naturally he understands that the run out would not be beyond a year after the selling period expired.

Q. Now, what percentage did you say of your con-

tracts were for five years?

A. About 25 per cent. You have that in the records, Mr. Collins. I gave you a list of it. It is approximately 25 per cent.

Q. Well, the reason that I was inquiring about it, I thought you had the information at hand. You were testifying from something.

A. Yes, I do. I have it here. It is 25 per cent.

[1123] REDIRECT EXAMINATION

Q: (By Mr. Rosen:) Mr. Mabry, in no case that you know of has any theater's screening agreement been made for a longer term than five years with your company?

A. Not with my company, no. Five years is the

maximum.

Q. Mr. Mabry, there have been two terms used here. I think, by Mr. Collins in his cross examination and just

so that is clear for the record let me ask you a question or two about it. Mr. Collins used two terms, the one was selling privileges, the term of the selling privileges, and the other was the term of the contract. Is there anything at all in any of those contracts with regard to the selling terms of the contract?

A. Indirectly, yes. The agreement states that any advertiser's contract sold during the term of his screening agreement will run to the completion of the advertiser's contract.

Q. But, I mean, they don't have two dates, one for the termination of a contract and one for the time in which you can sell advertising?

A. No, they run together. In other words, you can sell during the term of the contract but the theater might screen after the contract has expired under what we term the run out privilege.

Q. Well, in case the exhibitor has negotiated a new contract with some other distributor prior to the expiration of the term of your contract, do they ever notify you of that fact prior to the expiration date?

other film company cannot start selling until my agreement expires. Say I was notified in October, we might say, and his agreement starts in January, he cannot start selling until January if I have an agreement with that theater.

Q. Well, once your company is notified that you are no longer to have the screening at the expiration, is it your policy to go out then and start to sell as many advertising contracts as you can or do you stop? What do you do in that case?

A. It depends on the run out term in the contract. If the theater agreement had a run out of only 60 or 90 days, I wouldn't sell any more ads.

Mr. Burgess: I offer the following stipula-[1126] tion, that if called Mr. Levere Montgomery would testify that he was for a period of six years manager of the Joy Theater chain and that in that capacity he handled all of the matters for that chain in connection with theater screen advertising and that

for the first few years during his management theater screen advertising was shown on the screen of their theaters on a non-exclusive basis MPA, Commerce Pictures and Alexander and that the arrangement was unsatisfactory to them in that he had no method of determing the number of ads which might be shown on the screen at any one time, that it varied from two and sometimes to ten'at other times and that the income was irregular and unsatisfactory and he decided to make an arrangement with one company, that MPA, Commerce Pictures and Alexander all dealt with , him for the sole right to show the theater screen ads and that he selected Alexander Film Company and entered into a one year exclusive contract with them and did not contract with the other two because he had a better financial arrangement, with a minimum guarantee contract, with Alexander than the other two companies would offer him; that upon entering into the contract he notified both MPA and Commerce Pictures to cease selling ads on the screens of their theaters and notified them that they would run out the contracts that they then had in existence, that he is no longer associated with the Joy chain but that the arrangement was satisfactory and approved by them so long as he remained in his position with them, which terminated about a year after entering into the original contract.

I believe that is all.

Mr. Collins: I am willing to stipulate that the witness if called to testify, would testify to as stated by counsel.

Mr. Burgess: Mr. Examiner, I would also like to say that the testimony of Mr. Carrigan in the original proceeding last spring in which he related the facts of his being told that he could no longer continue to show advertising on the screen of the Joy chain.

Trial Examiner Kolb: Is that stipulation satisfactory to you, Mr. Collins?

Mr. Collins: Yes.

CERTIFICATE

I, the undersigned, do hereby certify that I have this day served a copy of the above and foregoing appendix for petitioner and appellant on the attorney for the Federal Trade Commission, by depositing same in the United States mail, postage, prepaid, addressed to said attorney at the post-office address of the Federal Trade Commission in Washington, D. C.

December 3, 1951.

LOUIS L. ROSEN.

Attorney for Motion Picture Advertising Service Company, Inc., Petitioner and Appellant.

TRANSCRIPT OF RECORD

OCTOBER TERM, 1952

No. 75

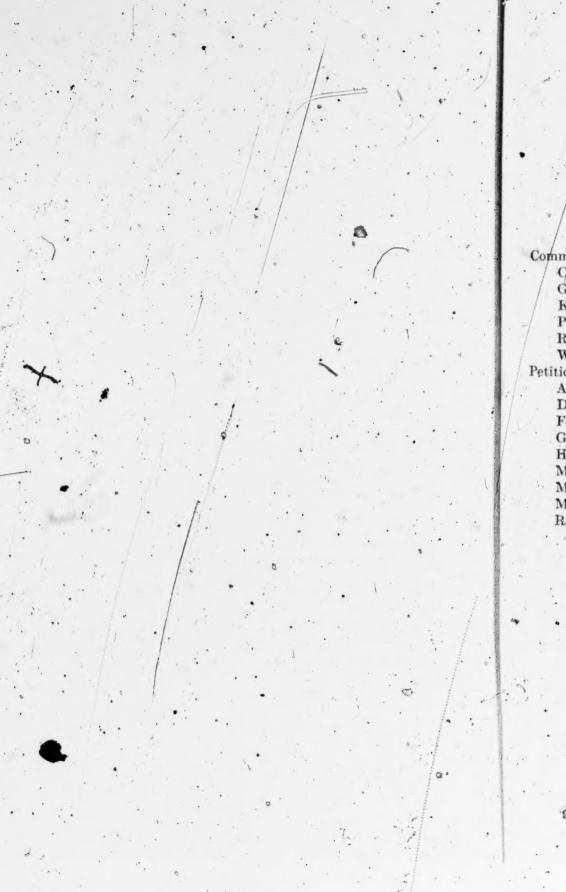
FEDERAL TRADE COMMISSION, PETITIONER

VS.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF

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MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

APPENDIX TO RESPONDENT'S BRIEF

I

EXTRACTS FROM TRANSCRIPT OF HEARINGS

[76]* T. B. GRINSPAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. Mr. Grinspan, will you please state your name and address and spell your name.—A. T. B. Grinspan, G-1-i-n-s-p-a-n, 1700 Keo Way, Des Moines.

^{*}Bracketed numerals used throughout this Appendix refer to page numbers of the Official Transcript of Hearings.

Q. Mr. Grinspan, in what business are you engaged?—A. Engaged in the production of film advertising, theater trailers and industrial film 1635.

Q. How long have you been so engaged?—A. The Company has been in business twenty-eight or twenty-

nine years. I have been there ten years.

Q. You have been connected with the Company

about ten years?-[77] A. Right.

Q. What is the name of the Company?—A. There two companies, Parrot Distributing Company and Parrot Films Studio.

Q. Now, Mr. Grinspan, were you engaged in renting, leasing, or selling or what distribution do you make of the films produced by you?—A. All films are sold outright either to the ultimate advertiser or through distributors traveling throughout the territory. They are bought outright from us and sold to the ultimate advertiser for filming purposes.

Q. That is advertising films?—A. That is advertis-

ing films.

Q. Are advertising films about which you speak, what are known as library films in the trade?—A. We used to make them several years ago and they were handled [78] that way—sold outright with arrangements for the screening of the films made either by the distributor who sold directly to the advertiser or the advertiser himself. Parrot Films has not had screening arrangements with dealers for many years.

Q. Do you know his initials?—A. N. C.

Q. And his address?—A. Bloomington, Indiana.

Q. Bloomington, Indiana?—A. Yes.

Q. Now, could you name some of these independent distributors?—A. Well, there was Mr. Campbell.

Q. Do you know generally what territory he worked?—A. Kentucky, West Virginia, Virginia, and North Carolina.

Q. Could you name some other independent dis-

tributor !- A. Robert Shulman.

Q. Now, getting back to Mr. Campbell. How long has he been [79] a customer of the Parrot Film Company?—A. He was a customer when I went with the Company and he is still selling some of our products.

Q. What lines of film did Mr. Campbell purchase from you?—A. Well, he formerly purchased so-called library films. He called on advertisers through the territory mentioned and was selling the films outright to the advertiser. At the present time he sells only

composite merchandise reels. .

- Q. You say he formerly bought the library films from you. When did he buy library films from you?—A. He bought them up to the time—about 1942, I would say. The production of library films was such that in order to sell it was necessary to sell outright at a price the advertiser would pay and he would have to sell a volume of business out of each particular production and as it decreased critically, we got out of production and have produced no library films since about 1942.
- [80] Q. Could you name any other customer?—A. Well, there was J. A. Pope down in Arkansas: He worked in Arkansas and Oklahoma.
- Q. For what period of time was Mr. Pope a customer of yours?—A. Well, it was for a two or three year period probably—between 1938 and 1941—in there someplace.
- Q. And for what type of products?—A. The same type, both library sold outright and composite merchant films.

Q. Do you recall approximately when you received the last order from Mr. Pope?—A. The last one I know about was prior to November 1942, which was the time I left the Company to go into service.

[81] Q. Could you name any other customer, Mr. Grinspan?—A. We have made both library and special films for Film Advertising Agency at Minneapolis.

Q. That is the company operated by Mr.

Dougherty?—A. Right.

Q. And for how long—Do you still sell to Mr. Dougherty?—A. Very little. I think one order in the last six or eight months. We were selling Mr. Dougherty his library films outright and inasmuch as we haven't produced any new ones for several years they became obsolete and we had nothing to sell to him in those particular lines.

Q. Mr. Grinspan, I believe Mr. Dougherty testified that he was unable to get library films from you. Do you recall any orders having been placed by

Mr. Dougherty which you did not fill?

Mr. Donnelly. I think you should include what period of time Mr. Dougherty was talking about.

By Mr. Collins:

Q. It was 1942.—A. To the best of my knowledge in 1942, Mr. Dougherty had a complete list of the films we had available and any on that list would be available to him. That is not true today. Any we have are obsolete and no new ones have been produced to satisfy his accounts.

Q. Why are you unable to supply library films at the present time?—[82] A. The main reason is fact we do not have enough outlet to distribute them. They are produced at a certain cost and in order

to sell competitively there a volume would have to be sold. They could be made specially for Mr. Dougherty if he placed an order for them if he could afford to pay the cost of the particular film. He can't and the same is true of anyone else's order. In making up library films if you figure a certain number of outlets and figure the costs of individual sales it is lower than if made for one particular individual. And not having an outlet for the films at the present time we are not making them. Mr. Dougherty evidently can't pay the costs for special production.

REDIRECT EXAMINATION

[87] By Mr. Collins:

Q. Mr. Grinspan, when was the peak of the business, would you say, in the library film business?—A. 1938 and 1939. After that it started to drop off.

- Q. It started to drop off after 1938 and 1939. Now, was the dropping off of your business caused by the lack of available films?—[88] A. I am in no position to state definitely what caused the dropping off so far as my personal knowledge is concerned.
- Q. Was there an increase or decrease in the orders received from your customers after 1939?—A. A definite decrease.
- [97] J. A. Pope was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. Where do you live, Mr. Pope?—A. Wagner, Oklahoma.

Q. In what business are you engaged?—A. Hotel.

Q. How long have you been in the hotel business?—
A. Three years.

Q. Just preceding the time that you went into the hotel business, in what business were you engaged?—A. I was a distributor of films to advertising trailers.

Q. For what period of time were you engaged in that business?—[98] A. About five years previous to the time I went to Wagner in the hotel.

Q. That would cover what period of time?-

A. Well, let's see, about 1940 to '45.

- Q. Just what was the nature of your business?—A. Well, I would go into the town and book my theater, find out what the rate was to run at the theater, and I would contact the merchant, sell him the film, and he would run them at the theater per so much per week or month or whatever the contract was, agreement was.
- Q. From where did you obtain the film?—A. Parrot Films, Des Moines, Iowa.

Q. You didn't produce films yourself?—A. No, sir.

Q. Prior to 1940 in what business were you engaged?—A. A film salesman on the road selling films.

Q. As a distributor?—A. No, sir; salesman.

- Q. For whom?—[99] A. Consolidated Advertising Corporation, Hollywood, California.
- Q. Mr. Pope, during the years of 1940, '41, '42, '43, '44, and '45 in which you say that you were engaged in the advertising film business as a distributor, what territory did you cover?—A. I put most of the time in Arkansas, some in eastern Oklahoma, and some in southern Missouri.
- Q. Did you work that territory yourself or did you have someone work the territory for you?—A. I

worked all of Arkansas myself. I had one man in Oklahoma for a while; I would say five or six months, and the rest of the time I worked Oklahoma, what was worked in Oklahoma.

A. I was selling advertising trailer; for instance, if you were a Ford dealer we would show the model of the car, the new models of the car, bringing out the features with voice. The footage would run about 40 feet, 40- 45-foot, with the [100] merchant's name on the trailer showing what firm handled the Ford.

[102] Q. During the period of 1940 to '45 were you or not calling on the theaters in Vinita, Oklahoma, in sixty- and ninety-day periods?—A. Yes, sir.

Q. Do you know how many theaters are in Vinita, Oklahoma?—A. Yes, sir; three—was at that time. I don't think there is but two now.

Q. Did you or not ever screen any film advertising on the screens of any of these theaters?—A. Yes, sir; one house.

Q. You know the name of the theater?—A. Well, as I remember, it was Victory; it was about a third-[103] or fourth-run theater across the street from the——

Q. Third or fourth run?—A. Yes, sir.

What do you mean?—A. They don't buy any first runs because the Griffin Amusement had them all bought up, froze out.

Q. For what period of time did you screen film advertising on the screens at the Victory Theater?—A. You mean how long a contract did I make on them or how long I kept ads running there?

Q. How long did you keep ads running there?—A. I kept ads running there all these three years on that one theater, small theater. However, I had several

merchants requesting—want advertising over on the Griffin Amusement House, which I believe the name is IMP, I believe; I won't be sure about the name, and I was refused the courtesy of letting them run on that theater due to the fact that they had a contract for the screen advertising either with United or Alexander. I wouldn't know which; I don't recall which firm.

Q. With whom did you discuss the matter?—A.

The manager of the theater.

Q. What did the manager advise you?—A. He advised me that he couldn't run them; they had an exclusive contract. He told me I could go into the main office, but I would find that condition. I did and found that [104] prevailed in all Griffin Amusement Theaters, so they told me, that it did.

Q. I believe you stated you didn't know or didn't recall whether they told you with what company they had the contract.—A. No, sir. I wouldn't be positive on that. It has been over three years since I sold any film, and I haven't been in contact with theaters in that length of time. I just wouldn't be specific. It is either one of the three firms. There are only three operating in this territory that I have been in; one is United; one is the Motion Picture Theaters out of New Orleans, and Alexander Film out of Colorado Springs.

[105] Q. During the period of time from 1940 to '45, did you do any work in the City of Miami, Oklahoma?—A. I tried to book it. I didn't never get bookings; no, sir.

Q. How many theaters?—A. Two, two at that time.

Q. Did you contact both theaters?—A. Yes, sir; both owned by one man.

Q. Both owned by one man?—A. Yes, sir.

Q. You know the name of the man who owned them?—A. Well, I have forgotten his name. I believe his name—I believe it is Thompson. I won't be sure on the name.

Q. Did you discuss the matter with the owner?—A. Yes, sir. I believe he told me that United—United had his exclusive. I believe he told me that. I know it was either United or Alexander; one had it tied up exclusive.

[107] Q. Did you work Claremore, Oklahoma?—A.

Q. How many theaters are located in Claremore?

[108] Q. Did the party that you contacted advise you why he would not screen your film advertisements?—A. Yes, sir.

Q. What was the reason given?—A. Exclusive contracts.

Q. Did he say with whom?—A. He told me; yes, sir. I don't recall which Company. It was either Alexander or United.

[109] Q. Did you ever solicit any theaters in a town of Tahlequah?—A. I come in contact with a theater; yes, sir.

Q. Do you know how many theaters there are ?—A. Two, two theaters.

[110] Q. Were you able to get any of your film advertisements screened there?—A. No, sir.

Q. Did Mr. Thompson give you any reason why he wouldn't screen your film?—A. Exclusive contracts.

Q. Did he say with whom?—A. I don't recall

whether he specified in that case or not. I called him up over the telephone at his home, and I won't be specific on that one.

[112] Q. Mr. Pope, was it your testimony that you contacted the theaters in the different towns that you have named in periods of sixty and ninety days through the years 1940 to '45?—A. I wouldn't say that I contacted them every thirty, sixty, or ninety days; no, sir.

Q. How often did you contact them?—A. That would be impossible for me to answer just truthfully because I just—I wouldn't know. If I was going through the town and could catch the exhibitor every sixty days, I would always contact him. I might come in this time and he is out of town, and I would miss him. I wouldn't catch him in for say, 120 days. It would be sixty days more before I would be back through that town. I tried to contact him, I will say every sixty to ninet days.

[115] Q. Did you ever work the town of Joplin, Missouri?—A. I have tried to, contacted the theaters.

Q. Do you know how many theaters are in Joplin?—A. No, sir; I wouldn't know exactly how many. I would say—I contacted five or six, best theaters, leading theaters.

Q. Did you contact—I believe you said you didn't know the names of the theaters?—A. No, sir; I don't remember the names of the theaters.

Q. And you don't know how many are in town?—A. No, sir. I don't know exactly how many, no. I know I didn't book any of them. I tried until I got tired of calling on them, and I quit, figured it wasn't

any use of-they was contracted. It would be no use of me wasting my time.

[124] Q. Did you ever work the town of Cape Giradeau?-A. No; contacted the theaters but never worked there.

Q. You contacted the theaters?-A. Yes, sir.

Q. Do you know how many are located in Cape Giradeau?—A. At the time I was there, about four, to the best of my knowledge.

[125] Q. Did you ever have any of your ads screened on the screen there?—A. No.

Q. Are those theaters members of a chain or are they independent theaters?-A. They are a chain.

Q. Did I ask you if you knew to whom you talked. with reference to those?—A. To the man-said he was the manager of the theater.

Q. Did he give you any reasons?-A. Exclusive contracts.

Q. Did he say with whom?—A. I don't recall.

[128] Q. Mr. Pope, why did you quit the film advertising business?

A. I couldn't book enough theaters to keep me going.

[161] Q. Mr. Pope, you had no difficulty getting film during any of this period from 1940 to 1945?-A. Very little, I would say.

Q. Get all you could sell?—A. That is right; that is right.

- Q. Was the quality of these trailers or this so-called library film pretty equal during this whole period from '40 to '45?—A. Well, to the best of my knowledge; yes. I had no complaints. I saw some running in the theater, saw them running along with Alexander and MPA and the United, and I couldn't see there was any difference.
- [169] J. A. Pope was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:
- Q. Mr. Pope, did you at any time during the years 1940 through 1945 solicit any theaters in the town of Fayetteville, Arkansas to screen film advertising?—A. Yes, sir.
- [170] Q. Were you able to get a screen contract with them?—A. No.
- Q. Did they give you any reason for not screening your film ads?—A. Yes; exclusive contract.
- Q. With whom?—A. Alexander, as well as I nember.
- Q. Did you ever contact any theaters in Little Rock, Arkansas, with reference to screening film ads?—A. Yes.
- Q. You know how many theaters are located in Little Rock?—[171] A. Well, as well as I remember, I contacted nine, I believe, in Little Rock.
- [172] Q. Were you able to get any of your screens—films screened?—A. No; not—in Little Rock.
- Q. Did they advise you the reason why?—A. Yes; exclusive contract.

Q. With whom?—A. Alexander, as well as I can remember.

Q. What about North Little Rock? Do you know

how many theaters are there?-A. Three.

Q. Did you contact those theaters from the year of 1940 to '45 with reference to screening film ads?—A. Yes.

Q. Do you know approximately how many times you contacted—A. (Interposing.) I run some stuff on one. I contacted them quite a few times, I would say six, seven, eight times maybe.

Q. Are those three theaters chain theaters?-

A. Two of them are and one is not.

Q. Two of them are chains?—A. Yes.

Q. Did you say that you did screen some film ads there?—[173] A. In one house; yes.

Q. Was that on one of the chains?—A. No, inde-

pendent.

Q. 1941 -A. Yes.

Q. Did you screen any after that time?—A. No; I didn't.

Q. Did you try to screen any film ads at that theater after that time?—A. Yes.

Q. Were you able to?-A. No.

Q. Why?—A. Because they had an exclusive contract.

Q. Where did you get that information?—A. From

this theater man, exhibitor.

Q: With whom did they advise you that they had—A. (Interposing.) As I remember, the Motion Picture Theaters out of New Orleans, Louisiana.

Q. Were you able to screen any ads with the two

chains ?-A. No.

- Q. Did I ask you if you know what chain they belong to?—A. I don't remember whether you did or not. I think they [174] belong to Robb & Rowley, or it could be Lightman there. I won't be sure. Little Rock, the two theaters over there in North Little Rock.—I believe it is Lightman out of Little Rock.
- Q. Do you know whom you contacted with reference to screening ads there?—A. Manager of the theater.

Q. There in North Little Rock?—A. Yes.

Q. You know approximately how many times you contacted them?—A. Well, several times, of course. I was having a heck of a time. I would see him; I would ask him, talk to him.

Q. Were you ever able to screen any advertise-

ments there?—A. No.

Q. Were you given any reason?—A. Yes. They

had an exclusive contract with somebody.

- Q. Did they say with whom?—A. Well, as well as I remember, it was one of the two. I wouldn't say which, Motion Picture Theaters, I believe.
- [179] Q. Did you ever contact any theaters in Pine Bluff, Arkansas?—A. Yes.
- Q: Do you know how many theaters are located there?—A. Well, I believe there was three that operates full time.
- Q. How many times did you contact those theaters during the years 1940 to '45?—A. About three times.
- Q. Do you know approximately the first time?—A. '40.
 - Q. Were you able to screen any ads there?—A. No.
- Q. Could you make any arrangements about it?—[180] A. No.

- Q. Why?-A. Exclusive contracts.
- Q. Did your theater manager in Pine Bluff, Arkansas, advise you with whom?—A. One of the two, just like it is in all of those cases. I can't specifically say, and you come back next time and you come back and Motion Pictures has got it, one time, Alexander. I won't go on record as positively knowing who has those screens or who did have them any time. I can't [180] do that. It is one of the two firms, I.
- Q. What about El Dorado?—A. Same thing, two

Q. Rol you know the name of them?—A. No; I don't. I take it back, three theaters in El Dorado.

Q. Char or independently owned?—A. Two are chain and one is independent.

Q. Did you ever do any screening business with any of those theaters?—A. No.

Q. Did you ever contact them to see about screening?—A. Yes.

Q. When did you contact them, if you know?—A. Last of '40 or the first of '41, as well as I remember.

Q. Do you know to whom you talked at the time?—
As The manager of the theater.

Q. Did he advise you why?—A. Exclusive contract; yes.

[182] Q. With whom?—A. I can't tell you, either one, Alexander or Motion Picture Theater Advertiser Corporation.

Q. He advised that the first time that you contacted him?—A. Yes; that they was tied up with—first time I ever went in there, always been tied up.

Q. What about Magnolia?—A. Same condition in

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Magnolia, two theaters, three—I am not sure whether it is two or three, all under one head.

Q. The first time that you contacted them, were you able to make any arrangements?—A. No.

Q. With reference to screening?-A. No.

Q. Any reason given to you by the party to whom you talked [183] A. Exclusive contracts.

Q. Who told you that?—A. Manager of the

theater.

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Q. Did he tell you with whom he had the exclusive contract?—A. He told me but I have forgotten which firm it was, Motion Picture Theaters or United or Alexander—I mean or Motion Picture Theater.

Q. You know how many theaters are in De Queen ?

A. Only on theater in De Queen.

Q. Did you contact anyone there with reference to screening?—A. Manager of the theater; yes.

Q. Were you able to make arrangements for screen-

ing film ads 3-A. No.

Q. Any reason given?—A. Exclusive contracts.
[184] Q. With whom?—A. Either one of the two firms.

Q. Which one?—A. Alexander or Motion Picture

Theater Advertising.

Q. What about Nashville, do you know how many?—A. One.

Q. Did you ever screen any ads there ?- A. No.

Q. Did you try to screen any?-A. Yes.

Q. Did you ever contact anyone there with reference to screening ads?—A. Yes; manager of the theater.

Q. Do you know approximately when that was?—A. I would say about '41, '42; I am not sure on that time.

Q. Were you able to make any arrangements about it?—A. No; exclusive contract, Alexander or Motion

Picture Theater.

[185] Q. What about Hope, Arkansas?—A. Three was when I was there; in '42, I believe I was there.

- Q. Did you contact anyone there with reference to—A. (Interposing.) Yes; manager of the theater.
- Q. Were you able to make any arrangements with him?—A. No.
- Q. Were you given any reason?—A. Yes; exclusive contracts.
- Q. With whom?—A. Alexander or Motion Picture Theater, I am not sure.
 - Q. What about Prescott?—A. Same thing.
- [186] Q. Were you able to make any arrangements about screening?—A. No.

Q. Was any reason given?—A. Yes; so tied up

with exclusive contract.

- Q. With whom?—A. Alexander or MPA, Motion Picture Theater. I don't remember which one of them.
- 189] Q. Were you ever at the to get any screen divertising shown on the screens at the theaters in Stuttgart?—A. No.
- Q. What about Hot Springs?—A. Same thing. Mr. Cozab. What respondent?

By Mr. Collins:

Q. Did they advise you why you couldn't? [190]
A. Exclusive contract.

Q. With whom?—A. Either Alexander or Motion

Picture Theater; Alexander, I believe.

Q. How many theaters are in Hot Springs?—A. I contacted about four, as well as I remember.

[192] Q. You know how many theaters are in Jonesboro, Arkansas?—A. Well, Jonesboro had two owned by the same man.

Q. Were you able to screen any ads on those screens there?—A. No.

Q. Did you try to make arrangements?—A. Yes.

Q. At what time?—A. Well, in the fall of '40, I believe.

Q. Do you know whom you contacted?—A. Man-

ager of the picture shows.

Q. Did he give you any reasons for not showing your film ads?—A. Yes; he said that he was tied up with a contract, exclusive contract.

O. With whom?—A. Alexander or Motion Picture

Theater.

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FURTHER RE-CROSS-EXAMINATION

By Mr. Burgess:

[198] Q. As to all of these theaters, you have testified that in these various 24 theaters that you were examined about in Arkansas, they told you their contracts were exclusive with either Alexander or MPA; is that right?—A. That is right.

- Q. As to any of those theaters, might it have been either one or somebody else other than Alexander or MPA?—A. I have never on any of them—have never had them to tell me anybody else unless it would be one of the two.
- Q. Did each one of them specify when you talked to them whom they had an exclusive contract with?—A. They had—would tell me; yes. I just don't recall about which way, about 50-50, about half was Alexander; the other half was Motion Picture.

[231] W. B. REICHART was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

- Q. Mr. Reichart, try to keep your voice up so the reporter can hear what you say, whether any of the rest of us do or not. Mr. Reichart, where do you live?—A. Baytown, Texas.
- Q. And how long have you lived there?—A. Two years.
- Q. Where did you live before that?—A. In Houston, Texas.
- Q. In what business were you engaged?—A. Theater advertising.
- Q. How long have you been engaged in that business?—A. Seven years.

Q. You began, then, in 1941?—A. 1941.

- Q. And when you started in the film advertising business, did you start in by yourself, or were you employed by [232] someone?—A. I was employed in 1939 by Alexander.
- Q. How long did you work for Alexander?—A. Approximately one year

Q. What were your duties with Alexander?—A. Soliciting advertising from the theaters for Alexander.

Q. Did you make any contracts with the theaters?-

A. Yes, sir.

Q. For what purpose?—A. For taking good will, and any new theaters that were being put up, to secure or obtain contracts for Alexander so we could sell motion picture advertising.

Q. Now, after you left Alexander, what did you do?—A. I went in business for myself, selling motion

picture advertising.

Q. Now, after you left Alexander, explain to us just the nature of your business, Mr. Reichart.—A. The nature of my business was to obtain theater contracts from theater owners for the privilege of selling advertisers film advertising to be displayed on their screens.

[233] Q. Now, under what name were you operating at that time?—A. The Theatre Publicity Service.

Q. Were you conducting the business alone, or did you have employees?—A. I had employees.

[234] Q. Approximately how many?—A. Over a

period of time, or a certain date?

Q. From the time you started on and through untily you-did you say that you are still in the business?—A. I still own the name—Theatre Publicity Service—but I am not operating physically at this particular time.

Q. How long have you not been operating?— A. Since September 2, 1947.

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Q. Could you tell us the territory in which you worked?—A. Texas, part of Louisiana, Kansas City, Missouri, and Kansas City, Kansas, and trade territories

Q. Did you contact any of the theaters yourself, while [235] you were in business?—A. Yes, sir.

Q. And did you ever have any relationship with the Mitchell Lewis Theatres in Houston?—A. Yes, sir.

Q. During what period of time?—A. From 1941

up until 1945.

Q. What was the nature of your business with the Mitchell Lewis Theatres?—A. I had contracts on the screen to sell advertising to the merchants and exhibit the film advertising at these theaters.

Q. How many theaters did Mr. Lewis have?—A. To

my best knowledge, five.

Q. And they were located where?—A. In Houston.

Q. Now, why did you stop showing films at the Mitchell Lewis Theatres?—A. I was told in 1945 that he had signed a contract with M. P. A.

Q. Who told you that?—A. Mr. Mitchell Lewis,

himself.

- Q. Who is M. P. A.?—A. Motion Picture Advertising.
- [236] Q. Now, did you ever have my business re-Ationship with the Jefferson Amusement Company?— A. Yes.
- Q. Is that a chain of theaters or one?—A. It is a chain.
 - Q. How many theaters?—A. Forty some odd.

Q. I beg pardon?—A. Forty some odd.

- Q. Where are they located?—A. In East Texas, Louisiana, and South Texas.
- Q. Did you ever have any film advertisements screened on the screens of the Jefferson Amusement Company theaters?—A. Yes, sir.

Q. For what period of time?—A. Two or three

weeks at a time.

[237] Q. Well, when did you begin?—A. In '44 or

'43 with Jeffenson.

Q. Now, do you recall how many theaters of that chain you screened advertisements at?—A. I think it was only two or three.

Q. Only two or three. Now, when did you say that

your stopped—in what year? A. In 1945.

Q. Now, can you tell us the reason you stopped?—A. The reason I stopped was because M. P. A. had the contract.

Q. Where did you get that information?—A. From the Jefferson Amusement officials.

Q. Located where A. At Beaumont, Texas. Sam Landra is his name.

Q. And what was his position with the Jefferson Amusement Company?—A. Vice president.

Q. And how did you contact him—by mail, or

how?—A. I contacted him by telephone.

Q. By telephone. And, do you recall what the conversa-[238]tion was—what you said to him?—A. Not word for word, but I remember that I did have some film to show at some of their theaters in the Tri-Cities and he told me he was sorry, he couldn't show them, I would have to take it up with M. P. A., because he had given the contract to M. P. A.

Q. I believe you said that you are not in the film advertising business now?—A. I am not active in it.

Q. Why aren't you actively in it, Mr. Reichart?—A. I did not have enough theaters to make any money.

Q. You did not have enough theaters?—A. No.

Q. Have you tried to get the theaters?—A. Not in the last year, because I was aware of the contracts—being a tradesman and in the business, I was aware of these contracts, and I felt the contracts were vital.

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By Mr. ROSEN:

- Q. As I understand it, sir; there are three important phases to this business—see if I am not correct? One is the securing of advertising contracts from advertisers; second, is the production of the advertising films to be displayed, and third, is the securing of screen privileges from theaters whereon the films are to be displayed for the benefit of the advertiser? Is that correct?—A. That constitutes the business, but I would say the number one subject would be the securing of the theater.
- [242] Q. Mr. Reichart, is it not a fact that in your experience in this business, all of the theaters limit the amount of screen advertising to be displayed on their screens?—A. Yes.
- Q. Why so?—A. Because with too many screen ads it has been proven that it annoys the paying customers who pay to get in the theater, not to see the ads but to see the picture itself, and the prime interest of the theater man is not to display advertising but to exhibit motion pictures.

Q. Does that limitation on the part of the advertising films carry with the different theaters involved?—A. Yes; each owner will have a right to make up his mind which will be and which will not be the definite amount of advantage.

Q. Would you say it will run, on the average, about four films per performance?—A. It has been proven over the years that the average theater would like to have no more than four.

[243] Q. In the cases where a theater undertook to make a theater screen agreement with more than one

distributor at the same time, wouldn't it be prebable that the distributor would be shipping in films to be displayed after making contacts with the advertisers for the display of the film, after producing or having produced for it the film and then find that the other distributor or others with theater screen agreements had filled the screen so that those films could not be displayed that week, or that performance?

[244] A. I. would say, from my experience over three years, which are seven or eight, that it is disadvantageous to every one concerned.

Q. For what?—A. For a position to exist where a theater has more than one contract with distributors unless that theater specifies in his contract that the distributor who obtains the contract with the theater will only be allowed so many ads per week and the dates specified.

Q. As I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous for all concerned—meaning everybody—the theater and the distributor?—A. And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought it, in fact.

[246] Q. Similarly, would it not be disadvantageous to the particular distributor who had expended the effort of selling the advertising, made up the films, paid the advertising commission, and then found that he could not have those films displayed in a particular performance or a particular week?

A. Under those circumstances, if that distributor would be working, I would say that would be at his own risk.

Q. It would be at his own risk, but undoubtedly in some cases he would conflict with others and could not get the advertising display at the time he wanted.—A. It would be free enterprise—that would just be the chance he would be taking.

Q. I asked you a question, though, Mr. Reichart, whether it would be disadvantageous to the distributor in [247] such circumstances?—A. I beg your

pardon.

Q. I understood you to say that it was disadvantageous in your opinion, to all concerned. I was trying to show the practical difficulties of doing business in the way the Government suggests it be done.—
A. I say it would be a disadvantage to the distributor; yes.

[250] Q. I notice that you stated that in connection with the Jefferson Amusement Company, which had forty theaters, that [251] you exhibited motion picture advertising in three of the forty—did I get you right?—A. That is correct.

Q. Did you ever undertake to try to sell the Jefferson Amusement Company on the other thirty-seven?—

A. Yes.

Q. Had you already sold advertising for those thirty-seven theaters?—A. No.

Q. What kind of a contract was it you tried to obtain from that concern—the circuit?—A. I tried to obtain any sort of a contract, on a per ad basis or a guarantee.

Q. And they let you exhibit advertising in three, but not in the other thirty-seven?—A. At the time that I was allowed to exhibit this advertising, the

Jefferson Amusement Company had consummated their contract with Alexander, who previously had the contract before M. P. A., and the time that I exhibited was time elapsed between the Alexander contract and the M. P. A. contract. At that time, it was just a matter of courtesy, that they would allow any one to run are ad on their theater.

Q. Did you ever make an attempt to secure screen' privileges with that circuit after you saw Alexander's contract [252] had expired?—A. Yes.

Q. For the whole circuit?—A. Yes.

Q. But not offering to pay them any guarantee for the whole forty theaters?—A. Not as much as they wanted.

· Q. Not anything?—A. Yes.

Q. What was the basis you offered?—A. Three dollars per ad basis for all their theaters with a guarantee of three and an option for four.

Q. State that again. Now, repeat that for me as to what your guarantee meant, so I will understand it.—A. I would guarantee three ads per week per theater, with an option to put one or more ads, which would make four which they would take, and pay at the same rate, or \$3.00 for the additional ad, and the total would be \$12.00 per week per theater.

Q. And that was the minimum, whether you sold

any more or not?—A. Yes.

Q. For the whole circuit of theaters?—A. Yes, sir.

Q. What did they want?-[253] A. \$7.50.

Q. You were not willing to meet that?—A. No, sir; I was not willing to meet that.

[255] Q.Mr. Reichart, in the cases in which you have tried to secure screens for your own company, is it or is it not a fact that Alexander has been in

competition with you for the obtaining of those screens?

A. Yes.

- Q. Is it also true that M. P. A. has been in competition with you for the obtaining of those screens?—A. Yes.
- Q. Is it also true that all three of you have been in competition with each other for those screens?—.

 A. To the best of my knowledge, it is true.
- Q. Have you ever had occasion to offer M. P. A. advertising which you had obtained for exhibition on theater screens under [256] contract to M. P. A.?—
 A. Yes.

Q. Have they refused to exhibit the films?—A. Not when possible.

Q. By that, I assume that you mean that when the theater screens were filled up for the particular time you wanted, they refused, but at other times, accepted the advertising?—A. I would leave it to their integrity and the fact that they did not have the space—outside of that, I would not know if they were trying to keep me off.

Q. Weren't there numerous times when they ac-

cepted the advertising?-A. That is right.

Q. And only the exceptional case was when they

turned it down?-A. That is right.

Q. And those cases, when they turned it down, they told you it was because their theater screens were filled?—A. That is correct.

Q. And in the cases in which they did exhibit the advertising that you wanted exhibited, you were paid the customary commission, were you not, of 15 percent less 2 percent discount—I should say, plus the

- 2 percent discount?—A. I was allowed that commission:
- Q. Isn't that the usual advertising commission in the indus [257] try?—A. That is the usual advertising commission in the industry.

REDIRECT EXAMINATION

By Mr. Collins:

- [259] Q. I understood you a while ago, Mr. Reichart, to answer Mr. Rosen that these contracts with the theaters were advantageous to the distributor and about what distributor were [260] you speaking when you said they were?—A. They were to the advantage of the distributor who has the exclusive contract.
- Q. Were they of any advantage to the distributor who did not?—A. Absolutely not.
- Q. And to whose customers or to what advertisers were they advantageous?—A. They were to the advantage of any advertiser who had been contacted by one who held an exclusive contract.
- Q. Were they of any advantage to the advertiser or prospective advertiser or the distributor who did not have the contract?—A. They were a disadvantage to him.
- Q. Now, was it advantageous to you, as a distributor, to have to go through the holder of the exclusive contract to get your advertising screened?—A. That was a disadvantage and a loss of profit.
 - Q. A loss of profit to whom?—A. To me.
- Q. Was it an advantage or a loss to the advertiser?—A. No.
 - Q. It was neither ?-A. No.

Q. Mr. Reichard, when you were unable to get advertising [261] films screened on the theaters because of the existence of an exclusive contract, was that an advantage or a disadvantage to the film company from whom you obtained your films?—A. Yes.

Q. Yes-what?-A. Yes; was a disadvantage-

they would not get to sell the film.

[268] ROBERT WEIGAND was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. State your full name, please.—A. Robert Weigand.

Q. Mr. Weigand, what connection, if any, do you have with the Commerce Picture Sales, Inc.?—A. Vice President.

Q. How long have you been connected with Commerce Picture Sales, Inc.?—A. Since its beginning, August 1941.

Q. And what is the nature of the business of the Commerce Picture Sales, Inc.?—A. The production and distribution of motion pictures for advertising

and some other purposes.

Q. Now, in connection with the production and distribution of advertising films, just what does the Commerce Picture Sales, Inc. do?—[269] A. Well, we produce a library of films for the use of advertisers in a general way. We contact theaters for the privilege, and obtain from the theaters the privilege of exhibiting advertising films on the theater screens.

And then, we contact the advertisers and obtain contracts with these advertisers for the purpose of rendering a service of exhibiting the films on the theater screens with whom we have contracts or other agreements permitting us to do that.

We do other production to render the service dis-

tinctive to the advertiser.

Q. In what territory does the Commerce Picture Sales, Inc. operate?—A. Our production takes place in and close to the city of New Orleans.

Our theater contracts and distribution, that sales efforts take place in Louisiana, Mississippi, Oklahoma, Arkansas, Alabama, and Florida, either directly through our own salesmen or indirectly through a distributor.

- Q. Now, when you say indirectly through a distributor, do you have more than one distributor!—

 A. We have only one distributor at the present time.
- [273] Q. Before you began activity with the Commerce Picture Sales, Inc., what were you doing, Mr. Weigand?—A. Well, there was a period of about two years where I was operating Commerce Pictures Corporation. Prior to that I was in the employ of Motion Picture Advertising Service.

Q. And that was when ?—[274] A. Approximately,

1934 to 1939.

Q. Now, during the time that you were in the employ of Motion Picture Advertising Service, Inc., what were your duties?—A. I was Sales Manager in the city of New Orleans.

[279]

CROSS-EXAMINATION

By Mr. ROSEN:

[280] Q. Just for the sake of the record, would you mind explaining what is a library film.—A. Well, a

library film, from my understanding, is a film that can be used by several advertisers when it has been added to by a commercial ending, identifying it with a particular advertiser.

Q. Am I to understand that that is a film which would be useful in a certain line of business like a drug business or maybe a dry goods business or some similar business and by adding the name of the advertiser where you advertise the subject matter. It is general and can be used for more than one advertising 2—A. That's right.

[285] Q. Is your company and your distributor in open competition with the Motion Picture Advertising Service Company in securing screen privileges from theaters in the territory that you testified of?

Mr. Collins. I object to that.

Trial Examiner Kolb. What do you mean, open competition? Strike the word, "open".

Mr. Rosen. I mean competition.

Mr. Collins. It is my understanding that the fact [286] should go in and that it is up to the Commission to determine whether or not that constitutes competition.

Trial Examiner Kolb. I overrule the objection.

The WITNESS. In answer, there are two ways of obtaining contracts. One is nonexclusive contract and another is an exclusive contract. In the case of an attempt for an exclusive contract, there is competition.

By Mr. Rosen:

Q. I take it from your answer that your company and your distributor attempts to secure exclusive contracts from those theaters who are willing to make contracts with you.—A. Our policy is to make nonexclusive contracts wherever possible, and it has been, from the beginning of our business, we have been forced in several defenses to make some—that is, our distributors have been forced in several defenses to make some exclusive contracts in order to be able to have some theaters in which to exhibit films.

- Q. You say your policy originally was to make nonexclusive contracts with the theaters?—A. Yes, sir.
- Q. Now, you try to have exclusive contracts because you are forced to do that by your competitors?—A. Not only now. In fact, our present distributor, Exhibitors Advertising Company, has found it necessary to make exclusive [287] contracts in order to be able to obtain enough business to stay in business.
- Q. Isn't it a fact, within your knowledge and experience, that theaters limit the amount of screen advertising that can be shown on the screen in any given performance?—A. There is usually a limitation, not only on the part of the theater but on our own side of the question. We don't wish ourselves to exhibit more than a given number for the reason that it is obnoxious to the audience and represents a lesser value to the advertiser.
- Q. On the average, what would you say that limitation was?—A. Well, in practically all contracts, the limitation is six or at the most eight advertising units in any given theater performance.

[295] Rene P. Karrigan was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. Give your full name and address.—A. Rene P. Karrigan, 525 Poydras Street, New Orleans, Louisiana.

Q. Mr. Karrigan, in what business are you engaged?—A. In the business of production and distribution of motion pictures.

Q. Under what name are you operating?—A. Com-

merce Picture Sales Corporation.

Q. And how long have you been engaged in that business?—A. Commerce Picture Sales Corporation has engaged in this business since 1941.

Q. And how long have you been engaged in it

personally?—A. Since 1932.

- Q. And were you working for yourself or were you employed by someone prior to 1941?—[296] A. Prior to 1941, I was employed by the Motion Picture Advertising Service Corporation of New Orleans.
- Q. And how long did you work for Motion Picture Advertising Service Corporation?—A. 1932 to 1941.
- Q. And then you—A. Formed the Commerce Picture Sales Corporation.
- Q. And you have been operating that business ever since?—A. Ever since?

Q. Now, is that a corporation?—A. Yes, sir.

Q. That's the one in which Mr. Weigand is connected, isn't it?—A. Yes, sir.

Q. Mr. Weigand is the man who testified on yester-

day in this case?-A. That's right.

Q. Now, Mr. Karrigan, what is the nature of your work with the Commerce Picture Sales, Inc.?—A. The nature of the business or the nature of my own individual work?

Q. The nature of the business and then, also the nature of your own work.—A. The nature of our business is to produce and distribute motion picture advertising services, through theaters and also [297] we produce motion pictures of an educational or you might say entertainment value to private accounts who wish to have them produced.

My own individual job is Sales Manager, handling sales and theater contacts for the Commerce Picture

Sales, Inc.

Q. The theater contacts, what do you mean by that?—A. In cases where we have to ship to theaters, which is the nature of our business. In other words, after we have made a contract through ourselves or through one of our distributors, it is our job to service the films to the theaters and it is my job to keep those contacts going so that the service flows in a smooth and even manner without interference.

Q. I believe also that part of your duties is to sell the advertising to the advertisers, is that right?—A. That's correct, or to instruct salesmen to do the

job or to help distributors to do the job.

Q. Mr. Karrigan, have you ever had any film ads on the screens of the theaters belonging to Jefferson Amusement Company?—A. We had a test run in one theater of Jefferson Amusement Company, which was done without charge.

Q. And you have never had any paid ads?—A. No, sir.

Q. Did you ever attempt to have any?—A. Yes, sir.

[298] Q. When was that?—A. I couldn't say definitely but I believe it was sometime in 1944 or 1943. I could refer back to my records and give you the exact date.

Q. 1943 or 1944?—A. That is merely a guess.

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Q. And who did you contact?—A. My contact was/ Mr. Sam Handum af Beaumont, Texas.

Q. Beaumont, Texas?—A. Yes.

Q. Where did you contact Mr. Handum?—A. At his office.

- Q. Did you relate to us—strike that—can you relate to us what was said by you and Mr. Handum on that occasion?—A. Well, that is a long time ago. It would be pretty difficult to recall the exact conversation, but the general thought was to solicit his screens for the use of Commerce Picture Sales Corporation for the sale of advertising for advertisers in his various towns where his theaters are located.
- Q. And upon that solicitation, did you get any reply from Mr. Handum?—A. After several visits, we had a reply to me personally that a deal had already been made regarding the screens and in that, the conversation with us ended.
- Q. Did Mr. Handum on that occasion tell you with whom the [299] Jefferson Amusement Company had made a deal with reference to screen advertisements?—A. Yes, sir; he told me that he made a contract with the Motion Picture Advertising Service Corporation of New Orleans.
- Q. Now, Mr. Karrigan, did you ever have any film ads on the screens of the Delta Theaters?—A. I was trying to make an arrangement with the Delta Theaters. As a matter of fact, they gave me a verbal arrangement and I shipped the film and the film was returned with instructions that they had made arrangements after they talked with me and decided not to run my service.

Mr. Collins. Mr. Examiner, at this time, I would like to have marked for identification Commission's Exhibit 19, a photostat of a letter written on a letterhead of the Delta Theaters and addressed to Com-

merce Picture Sales, Inc., New Orleans, Louisiana, and signed Mrs. W. L. Paternostro, Delta Theater. The letter is dated November 28, 1944.

(The paper referred to was marked Commission's

Exhibit 19 for identification.)

By Mr. Collins:

Q. Mr. Karrigan, I hand you a document which has been marked for identification as Commission's. Exhibit 19 and ask if that is the communication about which you just now spoke?—A. Yes, sir; this is a letter that came into our office.

Mr. Collins. Mr. Examiner, we desire to introduce

that [300] as Commission's Exhibit 19.

Trial Examiner Kolb. There being no objection, the letter will be admitted as Commission's Exhibit No. 19.

(The paper referred to, heretofore marked for identification Commission's Exhibit 19, was received in evidence.)

[304] Q. Now, Mr. Karrigan, I believe you were present yesterday and heard Mr. Weigand testify, were you not?—A. Yes, sir.

Q. You heard him testify with reference to the Motion Picture Advertising Company screening film ads for the Commerce Picture Sales,/Inc., did 'you?—A. Yes, sir.

Q. Now, what was the arrangement that the Commerce Picture Sales, Inc., had with M. P. A. with reference to screening film ads for Commerce Picture Sales, Inc.?—A. You say, what was the arrangement or what is the arrangement?

Q. Well, is and was; why do you say is?—A. Well, the present arrangement goes back about three or four years. And the permit is strictly a verbal agreement

which permits Commerce Picture Sales Corporation to display advertising on the screens held exclusively by Motion Picture Advertising Service Company and we receive an agency commission.

That same thing applies in reverse if the Motion Picture [305] Advertising Service Company desires to place their films on the screens operated by our distributors, why we give them the same privileges and allow them the same rate of commission.

Q. Now, you say you allow the same rate of com-

mission ?-A. That's right, sir.

Q. Now, when you have films screened on screens controlled by M. P. A., do you receive more or less money for such service than you do for services when the Commerce Picture Sales, Inc. makes an arrangement with the theaters independently?—A. We receive less.

Q. You said this arrangement began about three years ago. What was the arrangement prior to that time?—A. There was no arrangement prior to about three or four years ago. I don't know the exact date that we started the arrangement. I would have to refer to my records, but there was no arrangement at the beginning, the first two, or three years we entered the business.

Q. And before that arrangement, about which you testified, was made, were you able to have films screened on the screens of theaters controlled by the M. P. A.?—A. Well—

Mr. Rosen. I object to that on the ground that the issue before the Commission is the present condition that exists and no useful purpose would be served in trying to show some practice which is no longer existing or is one of the [306] charges made by the complainant against this respondent; that the refusal to exhibit on screens under exclusive contract, advertising of other distributors or other film companies.

The witness has stated with respect to his company that the arrangement is now and for the past three years has been to the mutual reciprocal benefit; each exhibiting advertising films for the other.

I don't believe that the Government is able to prove the charge by showing what happened three or four years ago and what has been discontinued since that time.

Trial Examiner Kolb. The motion will be overruled, as matters that are material show general background.

The WITNESS. No, sir.

[307]

CROSS-EXAMINATION

By Mr. Rosen:

Q. When you first went into this line of endeavor as an employee of M. P. A., did theaters at that time give exclusive contracts to the distributors?—A. Yes.

Q. Some gave exclusive contracts and some gave

nonexclusive contracts?—A. Correct.

Q. To several distributors?—[308] To restate myquestion for the record, some theaters gave exclusive contracts to one distributor and other theaters gave nonexclusive contracts to several distributors?—

A. That's correct.

Q. And on some occasions, some theaters gave non-exclusive contracts to one distributor alone, isn't that true?—A. To my knowledge, I don't know of any theater where nonexclusive contracts were in existence where they are not more than one type of service running for more than one distributor.

Q. Is it your statement then, that in all cases in which theaters made nonexclusive contracts, they

entered into those contracts with more than one distributor at the same time?

The WITNESS. What the theater did in the way of contracts, I wouldn't know.

By Mr. ROSEN:

Q. You mean in 1932?—A. When I first went into this business or any time—are you asking me to determine whether the theaters which were [309] non-exclusive gave contracts to all distributors.

That I couldn't say. I did say that to my knowledge every theater who held a nonexclusive contract had more than one service on its screen.

What contracts they had with other companies, I couldn't testify to because I didn't sit in the offices of the theaters when the contracts were made.

Q. Well, take the present situation. Now, you, as part of your duties for your corporation, are engaged in the business of securing screen privileges from theaters, is that right?—A. That's right.

Q. Is there a contract which you have on your books right now or one of your distributors on his books right now which does not contain an exclusive clause, but in which the theater does business with you or with your distributor alone and has no contract with other distributors. Is my question clear?—

A. In other words, you are asking me if I have any contracts in my office in the name of Commerce Picture Sales, Inc., or in the names of our distributors which are nonexclusive?

Q. In which you alone—A. In which we alone run the service?

Q. In which you alone have a screen agreement with the theater?—A. That again I couldn't answer. In other words, my contract [310] that I have tells

me that I can run service but I can't state whether the theater has other contracts.

- Q. Well, can you state this much for the record. In the cases in which you have nonexclusive contracts, are other distributors permitted by the theater to ship in films without contacting you and have those films screened?—A. Sure.
 - Q. In every case where you have a nonexclusive contract?—A. Sure.
- Q. What was the practice in regard to the operation under that contract?—A. The actual practice is that our salesmen will go and sell ads and perhaps he will, at the same time, meet other salesmen who will sell ads on the same screen.
- Q. Well, there are some cases in which more than one will go into theaters and screen films at the same time?—A. Yes; many cases.
- Q. So, that the only cases in which the theaters will not accept film advertising from other distributors insofar as your company is concerned, are those cases in which your company or distributors hold exclusive theater screen agreements?—A. Well, that is the way the contracts are more or less drawn up. However, we have found from experience that in a great many cases, the theaters don't live up to those contracts [311] even though they have given us exclusive privileges.

We have found that other film companies have placed ads on the screens of our exclusive theaters.

- Q. Are those cases in which you have films on the screens?—A. In cases where we have full screens, we have found our competitors running service.
- Q. You mean the theaters in those cases just breach that clause in the contract?—A. That's right.
- Q. But the screen—will you have exclusive contracts on your films—only your films are authorized

to be shown on the screen, isn't true?—A. That is the way the contract is snown.

Q. Only in exceptional cases would the theater breach the contract?—A. That's right.

- [316] Q. In the competition among the distributors for theaters screen agreements, minimum guarantees are resorted to on occasions in order to induce the theater to make an exclusive contract; is that right?—A. That's correct.
- Q. In such cases the distributor who has the exclusive privilege must pay the guarantee whether the films are screened or not?—A. That's correct.
- [317] Q. The arrangement that your company handles with M. P. A., they allow you the agency commission, I understand you to say. What amount is that?—A. Fifteen percent.

Q. Is that the standard or usual rate allowed throughout the country to advertising agencies?—A. Correct.

Q. That is the same rate that you allow them when

they book through you?-A. That's right.

- Q. Has there been any change that has taken place from 1932 to the present time with regard to securing of theater screen agreements, with regard particularly to the question of exclusive clauses in the contract?—A. Well, that I don't know. I could only guide myself in accordance with the way we make contracts with the theaters that we do business with. But what our competitors do is beyond our knowledge; whether there has been any change in the way the contracts are made we wouldn't be able to state.
- Q. Well, let me ask you first when you first worked for M. P. A., that company and competitors of that

company obtained exclusive contracts from theaters sometimes and non- [318] exclusive sometimes, in 1932, didn't they?—A. That's right.

Q. And that condition has not changed from 1932 to the present time, is that right?—A. You mean the

condition of making contracts?

Q. In some cases, theaters make exclusive and others nonexclusive.—A. That condition still exists.

Q. When you go in yourself to negotiate a theater screen agreement, do you attempt to make it on an exclusive basis?—A. No, sir.

Q. Do you have any exclusive contracts?—A. Not in the name of Commerce Picture Sales Corporation.

Q. In the names of your distributors?—A. They have.

Q. They have exclusive?—A. That's right.

Q. Don't you direct them—their policies in connection with that?—A. No, sir; they handle their own theater connections.

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Q. So that while your distributors at the present time do have some exclusive contracts, your practice in getting screen privileges for your own company is to take nonexclusive contracts?—A. That's right. [319] Q. Do you have any exclusive contracts?—A. No, sir; not in the name of Commerce Picture Sales Corporation.

Q. Well, I was trying to draw any fine distinction between your company and your distributors. What is the significance to the last answer, not in the name of—A. Well, the question of exclusive contracts during the course of this hearing has been along the lines of how many exclusive contracts do we hold, and our answer has been none; that they are held by our distributors and I want to keep that point clear.

- Q. Mr. Karrigan, you say that your practice is to obtain nonexclusive contracts, whereas your distributors' practice is to obtain exclusive?—A. I did not say that. Our practice is to try to obtain non-exclusive contracts, and our distributors have some exclusive contracts.
- [320] Q. In the case of a nonexclusive theater contract, how do the various distributors who have contracts with the theaters, assert when they go out to sell advertising, when the ads will be shown in the theater?—A. I don't know how the other distributors assert that fact.
- Q. How do you do it?—A. We determine from the theater before we start selling what space is available and I say, as they go to work to sell, they report those ads to the theater and the theater is posted as to what to expect and he knows he has allocated those spaces and he runs it.

Q. Well, that condition as to how many films are booked through that theater changes from day to day as advertising is sold, does it not?—A. It could.

- Q. So, if you have learned—if you did learn from a theater with whom you have a nonexclusive theater today that there were three spaces available next week and you went out to him to sell the ads, maybe the condition would change?—[321] A. Well, usually when the theater tells us that there is some space available, he is just as anxious to get those ads on the screen as you are to sell them.
 - [322] Q. You testified with regard to the Billy Fox Theaters. I understand one is the Fox Theater in Bunkie and one was the theater in Marksville.—A. Yes, sir.

Q. Who has the screen agreements with those theaters at the present time?—A. The Exhibitors Advertising Company.

Q. That is your distributor?—A. That's right.

Q. Is that contract exclusive or nonexclusive?—A. At the present time it seems to be a very non-exclusive contract because we have just recently checked and found competition.

[323] Q. What does the contract read?—A. The contract reads exclusive.

- Q. When your distributor got the contract, isn't it a fact that the owners had already entered into a contract with Motion Picture Advertising Sales; they breached the contract and then turned it over to your distributor?—A. That I wouldn't know; I did not make the contract myself.
- Q. Who are your competitors for screen rights in this territory?—[324] A. Well, the Motion Picture Advertising Company, the Alexander Film Company and every now and then someone from out of town that might come in from some other area with special deals.
- [330] Q. At the present time, you have, as you testified, an arrangement with M. P. A. under which you book some films in theaters on screen agreements with them and they book some with theaters on screen agreements with you or your distributors?—A. That's right.
- Q. The result of that is that you are able to obtain for your advertisers distribution in more theaters than if you exhibit those films in the theaters under contract to you alone?—A. Not in all cases.
- Q. What is the exception?—A. Well, some exceptions are when we request the theaters [331] and they

reported as being full, which cuts out our customers of distribution for that area.

- Q. Give me an illustration of that?—A. I will give a specific illustration right here in the city of New Orleans where we asked the Carrollton Theater for a customer and were told that it was full.
- Q. By whom?—A. By the Motion Picture Advertising Service Company, and later on we found that our customer was given the Carrollton Theater on a direct contract.
- [332] Q. Mr. Karrigan, counsel asked you if you were not able to have your ads screened in more theaters by having access to the theaters controlled by M. P. A. Does the existence of exclusive contracts between M. P. A. and the different theaters give you and your distributors a wider distribution of your advertising films?—A. To a certain extent.
 - Q. It does?—A. To a certain extent.
- Q. So the exclusive contract is no hindrance to your business?—A. Other than the fact that there is no profit in the booking.
- [340] Noble C. Campbell was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Collins:

Q. Mr. Campbell, would you state for us the nature of your business?—A. I am distributor of Parrot Films, Des Moines, Iowa.• I sell advertising, screen advertising to the business firms, collect for it, order it made and shipped direct to the customer.

Q. Do you or do you not make any arrangements with the theaters for displaying?—A. In each case I

make a written contract to run a certain length of time, whatever time that may be.

Q. Do you make that arrangement before or after you have contacted the advertiser?—A. I make that before. The first thing I do when I start [341] working a town I call on the theater and make a contract. Otherwise I don't work the town.

Q. Then after you have sold the advertising to the advertiser, from where do you obtain your films?—.
A. I send the orders into Parrot Films, Des Moines,

Iowa, and they ship direct to the customer.

Q. Now, what territory do you cover, Mr. Campbell?—A. Well, of recent years it is Virginia, West Virginia, North Carolina, South Carolina, Kentucky, and three spots in Indiana.

Q. How long have you been engaged in this business?—A. Well, I have been in this business approximately 18 to 20 years. I have been with Parrot Films

12 or 15 years.

Q. Mr. Campbell, did you ever transact any business with any theaters in Charlotte, North Carolina?—
A. At where?

Q. Charlotte, North Carolina.—A. Not in Charlotte, North Carolina; no, sir. I have contacted the home offices of two chains in Charlotte, North Carolina.

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Q. What were the names of those two chains?—A. The Kinsey Amusement Company. That is not exactly the right name. I'll have to look it up again, and the Everett Amusement Company. Thatwas the Wilkie Kinsey Amusement Company.

[342] Q. Where are their theaters located?—A. They are scattered all over North and South Carolina and Georgia.

Q. Did you say that you did or did not do business with the Wilkie Kinsey Amusement Company?—A. I

did not. I failed to make a contract.

Q. When did you contact them?—A. In recent years I would say I contacted them three or four times over a period of six or eight years.

Q. And were you advised of the reason that you could not do business with them?—A. Yes; you mean

the Kinsey people?

Q. Yes.—A. They had an exclusive contract with Alexander.

Q. Anyone else?

Mr. Rosen. I object to that on the grounds it is leading and suggestive. The witness has answered the question.

Trial Examiner Kolb. The witness may answer the question. Was anyone else mentioned besides the Alexander Film Company in your discussions with the Kinsey chain?

The WITNESS. No, sir.

By Mr. Collins:

- Q. Did you ever do any business with any theaters in Nashville, Tennessee?—A. No, sir; I never have. I have tried to contact them. [343] I never did meet him. The Tennessee and Western Kentucky area is pretty much tied up and some parts of Georgia is pretty much tied up with the Sudecum Chain in Nashville and I have never called on their home office, but their managers have told me that they had exclusive contracts with either Alexander or M. P. A.
- Q. Now, do you know how many of the theaters you contacted in that chain?—A. Not too many. I made a circuit in Western Kentucky.
- Q. You did what?—A. I made a circuit in Western Kentucky two or three years ago and didn't make a single contract because they were all Sudecum Theaters, you know.

Q. Sudecum Theaters?—A. That is right, and they couldn't do any business:

Mr. Collins. I think that is all.

CROSS-EXAMINATION

By Mr. ROSEN:

[344] Q. The headquarters of the Sudecum Theaters, you said, was in Nashville, Tennessee?—A. That is right.

Q. And your testimony with regard to that chain given a moment ago was based on what you say the manager of one of their theaters gave you?—A. No; several of them.

Q. Had you ever been to see one of the heads of that Sudecum Chain?—A. No.

Q. You made no attempt to secure the screen privileges for that circuit?—A. Yes; I did.

Q. Who did you see? A. Various managers in the towns.

Q. The individual theater operated by that manager?—A. No; some Sudecum Chain operates and their associates operate perhaps 200 theaters or maybe 300 theaters. In fact, in Tennessee, see, they have so far as I know every good [345] town tied up by Sudecum Theaters.

Q. How many managers did you speak to ?—A. Oh, I would say—

^Q. Just approximately?—A. Well, I'd say easy 10 or 12.

Q. Located in different towns?—A. Different-towns.

Q. You mean you spoke to these managers with respect to getting a screen privilege for that particu-

lar theater operated by that particular manager?—
A. That is right.

Q. But no attempt was made by you to cover the whole chain of the Sudecum circuit by a screening agreement covering all [346] of their theaters?—A. No.

Q. Because you were not prepared with your limited organization to sell advertising in all of those towns, were you?—A. Yes.

Q. Str ? A. Yes; I was prepared to sell them.

Q. In Tennessee ?—A. Yes.

Q. What organization, if any, did you have to sell advertising in Tennessee?—A. I didn't have any organization but I have the rights to go into Tennessee and operate the same as I do in North Carolina, or Tennessee, or Virginia.

Q. You mean that your agreement with the Parrot Film Company permits you to go in there if you want to?—A. My agreement with Parrot Film Company permits me to go everywhere east of the Mississippi River with the exception of Ohio and Michigan.

Q. My question was this, that once you have secured the right from the theater of screening films, then you said the next step was you would go in and sell

the advertising?-A: That is right.

Q. Well, had they given you all the theaters in Tennessee, it would have then become necessary for you to go into those [347] towns and sell advertising in Tennessee, wouldn't it?—A. That is right.

Q. Did you have any organization prepared to

Q. Did you have any organization prepared to handle that work?—A. I didn't have any but if I could have booked Tennessee I could have easily.

Q. Built up one?—A. Yes.

Q. You would have then organized some sales force to go into those towns?—A. That is right.

[349] Q. I understood you to state that your method of doing business was to first contact the theater and get the right from the theater to exhibit the film and thereafter, if you got it, to go out and sell the ad?—A. That is right.

Q. Now, I want to ask you something about that. because I am [350] ignorant on this subject.—A. O. K.

Q. When you would go into any theater and then get the right to exhibit and film that, how long would that right exist, for one day, one week, or one year?—A. That would be up to the theater.

Q. Generally, give me a general case?—A. Gen-

erally four weeks is my system.

Q. Four weeks?—A. Yes.

Q. So that you would go into the theater and get a right from them to exhibit some films for four weeks?—A. That is right. Then I would call on that theater three or four times a year. In other words, in place of running continuous I would run a month and off two or three months.

[356] Q. Then, according to your testimony, Mr. Campbell, you make these arrangements for four week intervals?—A. That is right.

Q. And then when you get through with that four week interval you have to go back to that theater to get another commitment for the next four weeks?—A. That is right.

Q. So that with regard to those theaters that do business with you, you have to repeat your contract 13 times a year?—A. No.

Q. I mean 12 times a year?—A. No; about four times a year.

Q. Welf, I say 4 weeks into 52 weeks is 13, isn't it?—A. No; I run a contract for four weeks starting on August 1, we'll say, that runs up four weeks during

the month of August, which is practically the last day of August, and then I am out September, October

and usually November.

Q. Why are you out those three months?—A. Because that is my way of doing business. In place of running continuously, my theory is that continuous advertising becomes monotonous to the public and we are on four weeks and we are out for three months. We give them a rest and then we come on with something entirely different.

Q. Let me ask you a question about that. Suppose you went [357] into a theater that was willing to write any kind of an arrangement you wanted. I understand that your policy is that you would run for one month and then be off for three months?—

A. That is right.

Q. That is your way of doing business?—A. That is right.

[360] Trial Examiner Kolb. Mr. Campbell, in your testimony with reference to your experience with competitors in which the Alexander Film Company was mentioned, was your experience with the Alexander Film Company, or their competition any different from that of the M. P. A. when you ran into it in certain theaters?

The WITNESS. No different except that I have not run into M. P. A. or the Kansas City outfit very much. In other woods, in my territory I don't know much about them. I have run to them and the theory is the same. They sign up contracts with theaters exclusive wherever possible, but they have not bothered me so much as Alexander. Alexander is the only outfit that has ever bothered me to any extent.

[366] Reid H. Ray was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hodgson:

Q. Your name?—A. Reid H. Ray.

Q. Your occupation?—A. President of Reid H. Ray Film Industries.

Q. Reid H. Ray Film Industries, Inc.?—A. Yes, sir.

- Q. That is the same corporation as is named in these proceedings as Ray-Bell Films, Inc?—A. It is. [367] Q. The corporation is the same corporation but the name has been changed?—A. That's right.
- Q. What is the business of the corporate respondent?—A. We have two divisions in our company. One we call the industrial division, which produces long-length motion pictures. Those are sales training—training, educational, and documentary motion pictures. The other division of our company we refer to as the film advertising division. The film advertising division producers, distributes, and sells film advertising.

Q. Did you hear the testimony of Mr. Alexander in Docket 5496, day before yesterday —A. Yes.

Q. Were you present during his testimony in its entirety?—A. Yes; I was.

Q. Did you hear the testimony of Mr. McInaney in Docket 5496, in the case of Alexander Film Company, which was introduced day before yesterday and completed yesterday?—A. Yes; I did.

[368] Q. Did you hear their description of the method of production of films, library films, trailers,

national advertising films, did you hear that testimony?—A. Yes.

- Q. How does your method compare with the method of the Alexander Film Company as related by them?—A. Our operations are exactly the same as the Alexander Film Company operations in the production and sale of film advertising playlets to local merchants and in the securing of contracts with theaters to display that advertising.
- [374] Q. You heard Mr. McInaney's testimony or Mr. Alexander's testimony about the suitable length of an advertising contract; I believe he stated that in order to get the best results from an advertiser, the contract should run a year. Would your answer to a similar question be identical with that of Mr. Alexander's?—A. Yes; that is a recognized advertising theory or axiom, that the length of an advertising contract should be at least a good consistent number of weeks to obtain results, not spasmodic nor short-term.
- Q. Is your business competitive?—A. Film adveratising business?
 - Q. Yes.-A. It is very competitive.
- Q. How did you grow from scratch in 1936 to 1,450 theaters in 1947?—A. Well, it took a lot of hard work, a lot of sales effort, to contact theaters and obtain screening agreements from companies that had been in the business for many years, and our sales manager and his sales force, by a lot of sheer [375] effort and hard work and consistent plugging, built one by one those theater contracts up until they gave us a nucleus for film advertising operations.

By Mr. Collins: "

[384] Q. Now, Mr. Ray, do you sell all the space available on the screens at the theaters where you have exclusive contracts?—A. Do we sell all the space in theaters where we have exclusive contracts?

Q. Yes; all the available advertising space?—[385] A. Well, that is the aim and the requirements of our salesman, where we have exclusive contracts, that that theater be kept as full as possible, because—

Q. (Interposing) Do you keep it full at all times?—
A. Well, I couldn't say that, because one contract may expire this week and before the next contract waiting to go on the screen is on the screen, there might be a vacant space of one week; theoretically; yes.

Q. Do you permit other distributors to screen advertising on those screens?—A. If there is space available, as I said previously, we do.

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Q. And on what terms, Mr. Ray, do you permit them to show their advertising on those screens?—A. Well, there would be no terms different to our competitor. We take the selling rate that we are charging our advertisers and would charge our competitor that same rate.

Q. You charge the competitor the same rate that good charge—A. Our customers.

Q. Advertising customers?—A. Yes; our customers.

Q. So in that case, then, the distributor who wanted to show advertisements on the screen would have to charge his customer more than you charge your customer in order for him to make any money out of 11?—A. No; because we would give him a commission.

[386] Q. You would give him a commission?—A. Yes, sir.

Q. And is that commission a set commission? A standard commission?—A. It is usually the custom-

ary agency commission, which is 15 percent.

Q. Now, Mr. Ray, is it possible for a distributor to obtain contracts with merchants and to supply the films and make the necessary arrangements with your company on the 15 percent basis?—A. Was your question: Is it possible, or profitable?

Q. Is it economically possible, from the distributor's standpoint?—A. Yes; it is, because many deals

are handled on a 15 percent commission.

Q. Then the films can be supplied and the contracts with the merchants obtained and all of that expense incurred there can be taken care of on a 15 percent margin?—A. Yes. Some of our salesmen, our own salesmen, work on a 15 percent commission.

Q. Yes; but in that case doesn't the Ray-Bell Com-

pany supply the films?—A? Yes.

Q. And that is not charged up—the cost of the films is not charged up to the salesman, is it?—[387] A. No.

Q. Now if he would charge the cost of the films up to the salesman and the next step, charge the cost of obtaining the contract with the distributor who had the contract with the theater, could the salesman come out on it then?—A. Well, of course, this competitor will probably have films that may have been supplied to him by a manufacturer or some special film that is going to run on a circuit in a large theater, and that advertiser has paid for those films.

[393] J. Don Alexander was thereupon called as a awitness for the respondent and, having been first duly sworn, testified as follows:

Direct examination by Mr. Burgess:

- Q. Will you state your full name?—A. J. Don Alexander.
 - Q. Where do you reside?—A. In Colorado Springs.
- Q. In what business are you engaged, Mr. Alexander?—[394] A. Motion picture advertising.
- Q. How long have you been engaged in the motion picture advertising business?—A. Thirty years on the first of next year.
- Q. With what film advertising company are you associated?—A. Alexander Film Company.
- Q. In what capacity are you connected with that company?—A. President and general manager.
- [405] Q. In connection with your contracts with the advertiser, what is the shortest length advertising campaign that you accept?—A. Thirteen weeks. They are very rare.
- Q. And what do you ordinarily recommend for an advertising campaign as a minimum?—A. For an advertiser who is in business throughout the year—and in most cases they are—we recommend a yearly contract, because this particular kind of advertising not only requires a consistent change or new freshness in the theaters of different advertising film subjects, but also requires and gives the advertiser best results when they are over a longer period of time. We call it accumulative value of advertising impressions. It is a well known advertising principle applying not [406] only to our medium but to other media as well, that spasmodic or temporary or small doses of ad-

vertising are not effective in putting over a merchandising idea or introducing or selling or popularizing any product or service. For that reason, we do not offer a so-called teaspoon taste of our advertising services, because if we did we would find that that particular taste was so tasteless that it would not create an impression and they would not feel that they had any benefit from their advertising, and therefore they would back away in disgust, and if they were ever approached again their answer would be that they had already tried motion picture advertising and found that it wasn't any good. For that reason, we would rather forego selling a contract rather than creating that condition in the mind of the prospect or merchant or national advertiser.

[408] Q. Now you have in the operation of your business several different types of service, do you

not?-A. On a rental basis, you mean?

Q. Well, you have your library film for local service; what other types of film ad business do you have?—A. Well, we have international business, which is an export business, where either special playlets are made or library playlets are remade by revoicing into foreign languages.

Q. I think we are not particularly interested in the international business, but how about your manufacturer-dealer arrangements and your national advertising accounts, do those [409] differ?—A. You mean the sale of the service to the national adver-

tiser?

Q. Do those differ from your local library playlet service?—A. Yes, sir. Yes; we self a series of specific playlets to national advertisers, which playlets are put in the library and offered by our sales force to

their dealers throughout the country. Is that what you refer to?

[410] Q. Now, more specifically, on those manufacturer-dealer arrangements, who pays the cost of production of the playfet?—A. The manufacturer.

Q. And he also pays the cost of the prints that are used by [411] the various dealers?—A. Yes, sir.

- Q. Then who pays the cost of the showing of the film on the theater screen for the dealer?—A. The dealer either pays all of that cost or in some cases he will pay a half of it. In some situations, as dictated by the manufacturers themselves and their sales outlet, the distributor pays a part of that. In some situations the manufacturer will furnish the films; he will furnish the films and the balance of the cost—of the cost of distribution—is divided between dealers and distributors.
 - Q. Now in addition to your manufacturer-dealer arrangements, you also have another division of your business which you call national advertising, do you not?—A. Yes, sir.
 - Q. Will you explain just what that national advertising consists of?—A. Well, our company is a distributor of General Screen Advertising, Inc., which is a corporation in Illinois, located in Chicago, which maintains a complete set of records of theaters which are under contract to us and half a dozen other distributors scattered around the country, and the General Screen Advertising sells to national advertisers, principally to national advertisers who make and sell such products as soap, drugs, foods, and so forth, where they do not have [412] dealers, but in any given community may have—pardon me, do not have exclusive dealers, I should say, but they do have many dealers.

As an example, a food product or soap may be handled by every grocery store in town. So that is not considered a good type of business for a manufacturer to have specific playlets made where dealers' signatures are attached. In most of these cases the type of film used or prepared for distribution on the General Screen Advertising method would be shown on the screens without any dealers' signatures whatever, because there being so many dealers close to every theater they couldn't get all the dealers' names on. * * *

[416] Q. Mr. Alexander, what is the usual length of the national advertising film?—A. The national advertising film is commonly called a minute movie, which means that it is ninety feet in length, although there is another length that is made where the subject is longer than usual and it is 130 feet. In other words, you might say it is a minute to a minute and a half in length, approximately.

Q. And what is the length of the usual manufacturer-dealer film?—A. That is 60 feet, including the

trailer.

Q. The manufacturer-dealer film is the same length as the library film?—A. Yes, sir. That length has been established as a standard for theater screen advertising since the beginning.

[417] Q. So that the exclusive contracts with the theaters have been a custom of your business ever since you first started in 1919?—A. Yes, sir.

[425] Cross-examination by Mr. Collins:

[426] Q. So in no cases, then, do your salesmen sell an advertiser unless your salesman has a contract

with the theater?—A. Right. It would be useless for him to do it, sir, because there wouldn't be any advantage to him. He'd be better off—if he were locked out of a certain theater situation, he'd be better off to go to another town or go fishing, or something, rather than send in a contract which could not be fulfilled. Does that explain it, sir?

[429] Q. Well, now, Mr. Alexander, when you solicit a national advertiser, do you inform the national advertiser of the theaters where you can show the film?—A. Yes, sir; many theaters.

Q. Pardon me?-A. Many theaters.

- Q. Well, do you represent to him that you can show the films in the theaters with which you have contracts?—A. Yes, sir.
- [430] Q. Do you represent to the advertiser that you can screen the films, in any other theaters except the theaters with which you have contracts?
- [431] A. The answer is, we do not represent to an advertiser that we can display his films in any theaters with which we do not have a contract. Does that answer your question, sir?
- [432] Q. New with these theaters with which you do not have exclusive contracts, just how do you go about selling the advertiser there?—A. We sell him a space on the screen if there is a space available for him, sir.

Q. Do you first ascertain whether or not there is space available?—A. Yes, sir; the salesman does that.

Q. The salesman first goes and ascertains if there is space available?—[433] A. Yes, sir,

Q. And then he goes and sells advertising?—A. Yes, sir.

[436] MICHAEL J. McINANEY was thereupon called as a witness for the respondent and having been first duly sworn, testified as follows:

Direct examination by Mr. Burgess:

Q. Will you state your full name?—A. Michael J. McInaney.

Q. In what business are you engaged, Mr. Mc-

Inaney?—A. Film advertising.

Q. And for what organization or company do you

work ?- A. Alexander Film Company.

Q. What is your official connection with the Alexander Film Company?—[437] A. Vice president in charge of sales.

Q. And are you the general sales manager of the

company ?-A. Yes.

- Q. How long have you been associated with the Alexander Film Company?—A. 24 years.
- [445] Q. And the forms of contracts which are used by the company include a clause which in substance provides that during the term of the contract the theater will not show screen advertising for any other advertiser, is that correct?—A. That's right.
- [455] Q. And so if you received the request from the manufacturer for theaters that are not listed in your manufacturer-dealer rate book, you attempt to deal through the film distributor that has that theater, regardless of who the distributor may be?—A. First we attempt to get them through our own sales force. If our salesman contacts the theater and he says he has an exclusive agreement with someone else, why,

then we know we have to deal through that other distributor.

Q. Now on your local advertising with the theaters, do you make screen space available to all other competitors upon request?—A. We make it available to competitors or to anybody that is interested in getting space. We got space to sell.

Q. Now will you state just how that is handled?—A. Well, if a client, advertising agency or a producer of films, writes us and says that their client or they are interested in securing space on the theater screen, we tell them that we'll be glad to service them if they can—if the films are of the standard length that we distribute, which is 60, 90, or 120 feet, which our contracts with the theaters provide for, that we cannot show any other length, and if the films are of the quality that we distribute and if the films are acceptable [456] to the theater, that we will be glad fo furnish them at our rate book-rates, less a discount.

Q. And if those three principles are satisfied, then you make your extra space on the theater screens

available to anyone?—A. Yes.

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[482] Q. Mr. McInaney, from your experience as general sales manager of Alexander Film Company, do you find competition in the film advertising field?—A. And how!

Q. Will you explain just what that competition consists of, so far as theaters are concerned?—A. Well, I would say 60 to 75 percent of our theater contracts, of which we have about nine or ten thousand, expire every year, and it is a wide open field for ourselves or anybody else to contact that theater and try tomake agreement [483] with him. So the competition is very keen in the theater end of it because that is the crux of our business.

Q. Is that competition among all of the fin advertising companies of the country?—A. Yes; every one of them are striving to get theater contracts and take them away from each other, to get new theaters to agree to sign up for advertising privileges.

[493] Cross-examination by Mr. Collins:

[505] Q. Now, Mr. McInaney, with reference to the dealer-advertising programs, I believe you stated this morning that after you had obtained the contract with the dealers, that you invited other competitors into the program?—A. After we obtain the contract from the manufacturer.

Q. After you have obtained the manufacturer's contract?—A. Yes; for product in of films and for the servicing of the program to all dealers throughout the country, then we invite other companies in.

Q. Now the number of other companies which you invite to participate in the advertising program is limited, is it not?—A. They are only limited to those who have production facilities and who render the same type of advertising that we do. We do not limit them, but this group on here are about the only ones in the business that have contracts with the theaters [506] providing for the type and length of films that we distribute.

Q. Now you say "this group on here"; would you express that so that the reporter can get it in the record there?—A. The names are listed on Exhibit 22.

Q. And those are what companies?—A. United Film Ad Company, Reid H. Ray Company, Alexander Film Company, Motion Picture Advertising Company, and A. V. Cauger Company. There are

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other distributors that handle the programs that are not listed on there, but they still handle the programs if they so desire,

[512] WILLIAM HARDY HENDREN, Jr., was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct examination by Mr. Cozad:

Q. Will you state your name, Mr. Hendren?—A. William Hardy Hendren, Jr.

Q. Where do you live?—A. In Kansas City,

Q. And in what business are you engaged?—A. Motion picture advertising, film advertising business.

Q. And you are connected with the respondent in this case?—A. Yes.

Q. In what capacity?—A. As president.

[513] Q. Mr. Hendren, how long has the United Film Service been engaged in the film advertising business?—A. Since 1924.

[515] Q. Now, Mr. Hendren, could United produce library or special film or manufacturer-dealer film if it did not have an outlet for the sale of these films?—A. No.

[516] Q. What is the method of securing this outlet?—A. The method of securing the outlet is to contract with theaters for screen space, in which to display our films.

Q. You speak of contracting with theaters; do you mean on an exclusive or nonexclusive basis?—A. On both bases.

Q. Which method of contracting guarantees an outlet for United?—A. Well, the only method that guar-

antees us a definite market for our film product is the exclusive film contract, because it is only in the case of the exclusive theater contract that we know that we have that much space available, and that much space available for the screening of films.

[518] Q. Has United been willing and is it willing at the present time to display film advertising for its competitors upon screens where United has an exclusive contract?—A. Yes; we are. Our business is to sell screen space, and if we have contracts that provide—contracts with theaters that provide for screen space which we haven't sold, we are anxious to sell it, and it is for sale to anybody that wants to buy, provided that the films conform to the length of film specified in our contract with the theater, and provided that the film is acceptable to the theater as to quality and subject matter.

Q. As an inducement for your competitors to show film ads upon your exclusive screens, do you pay any commission?—A. Yes; we will pay a commission for anyone that is a competitor of ours or an agency, a recognized advertising agency who places with us an order for the showing of films in spaces that we have

open for sale.

[533] Q. Mr. Hendren, what is the average length of United's exclusive contracts?—A. Well, that would be difficult to answer as to the average length.

Q? What is the minimum and what is the maximum, then?—A. Well, the minimum is a year. We do have some exclusive contracts which will run for five years, but most of them will run two or three years.

Q. As I understand it, the majority of your exclusive theater screening agreements, then, run two or three years?—A. Yes.

[552] Cross-examination by Mr. Collins:

Q. So, Mr. Hendren, it is your contention, then, that a distributor without exclusive contracts has no show in the distributing business?—A. No; Mr. Collins, I wouldn't say he has no show. I would say that it is of material assistance to him in building a business, as was stated by certain of your witnesses.

Q. And a distributor without exclusive contracts is without any advantages in the business, isn't that what you say?—A. Mr. Collins, I can't imagine a distributor in the film advertising business who wants to succeed being unable to secure exclusive contracts with the theaters.

Q. And if you haven't got an exclusive contract, you can't get in, can you?—A. Yes, sir.

Q. You can?—A. Yes, sir. There are many theaters with which we hold contracts which are nonexclusive contracts.

Q. And you can operate and operate successfully without?—A. I said that a man could operate.

Q. Well, can you?—[553] A. To a degree, Mr. Collins, yes, but not to the degree that it requires to invest the type of money in building the library type of service that we build.

[561] Q. But where you have an exclusive contract, all advertisers who have advertising shown on that screen have to go through the United Film Company to get on, do they not?—A. Yes; they do in most cases, there are a few exceptions.

Q. There are a few slip in the back door A. No; there are a few, Mr. Collins, that are exceptions where we grant an exception to the theater.

Trial Examiner Kolb. Now, Mr. Hendren, you mentioned a few minutes ago that the national advertising is taken by the Movie Advertising Bureau; is that a trade name used by your company, or is that a separate organization?

The WITNESS. No, it is a trade name used by our company and by the Motion Picture Advertising

Service Company.

Trial Examiner Kolb. Another thing which I would [562] like for you to clear up for me: You mentioned in connection with showing films for competitors in theaters where you had an exclusive agreement, that you did that on a commission basis. Will you explain that, how that works?

The WITNESS. Well, if we have a competitor who wants to get us to run a film for some advertiser of theirs in some exclusive theater of ours and we have screen space open, we give them a clearance on it and we allow them an agency fee for having secured that business and placed it with us.

Trial Examiner Kolb. What does that usually

amount to, generally?

The WITNESS. It usually amounts to 15 percent.

[564] C. J. Mabry was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct examination by Mr. Rosen:

Q. Will you state your name?—A. C. J. Mabry.

Q. Mr. Mabry, you are the president of Motion Picture Advertising Service Co., Inc.?—A. Yes. Q. How long have you been president?—A. Since June 1st, 1948.

Q. Mr. Johnson was president, and upon his death you were promoted from vice president to president, were you not, at that time?—A. Yes.

Q. What had been your capacity with the company prior to your election as president?—A. Vice presi-

dent in charge of sales.

Q. How long have you been connected with the company?—A. Since January 1925, approximately

23 years.

Q. I want you, for the benefit of the record, to state the history of this company, the nature of the business conducted by it and the growth from the time the company commenced until the present time?—[565] A. Well, the company was organized in September 1921, and from that time until June 1925 the company acted as a distributor of advertising films; it might be termed an exchange of advertising films.

The main source of films at that time was Adogram's in St. Louis and Harcol Film Company in New Orleans. They produced the films and sold them to us, and we used those films to serve various advertisers

that we sold.

During those years, acting as strictly a distributor on exchange of advertising films, we didn't make so much progress. And we noticed competition moving in on us with a life action film. So we organized our own studio in June 1925, and became a producer as well as a distributor, distribution not limited to our own films, but including other advertising film campaigns that we could purchase or rent, and we felt were acceptable to the theaters that we served.

From that time on, we have steadily grown from one of the smallest companies into, I believe, the

second largest in the business today, from a volume standpoint. * * *

[568] Q. Mr. Mabry, suppose you proceed now to tell us the various branches of your business, the organization, how that has developed.—A. Well, we have in our business four, you might call it five, departments. We have a production department that produces a library service, a journal library service; also produces what we term as special library service, and it produces special films to order of advertisers.

We have a service department whose responsibility is the receiving of those films and the shipping of the films to the theaters and receiving it back from the theaters and shipping them out to other theaters.

We have an accounting department, which of course handles the administrative and keeping the records.

We have a sales department whose duty is to contract advertisers and sell advertisers, and we have a theater procurement department. The theater procurement department's responsibility is to make agreements with theaters to display advertising films produced by us and advertising films that we might distribute for other producers. [569] I think the functions of those departments—I mean just the name of the department tells you what its function is.

Q. Which department or departments were under your supervision and management, specifically, up to the time you became the president of the company?—A. The sales department and the theater procurement department.

Q. By the sales department you mean the securing of advertising for advertisers?—A. The securing of advertisers.

Q. And the securing of screening privileges from theaters?—A. And the securing of screening privileges was handled by the theater procurement department under my supervision, and on most of the circuit deals I personally negotiated the deal, approved it.

Q. That is, the securing of the screening privi-

leges?—A. Of the screening privileges.

Q. What kind of contracts does your company make with regard to the securing of screening privileges?—A. Well, we make contracts, under the terms of which we rent or lease all of the time and space that the theater has for advertising, and we then, of course, lease that for resale to other advertisers and distributors, and then we enter into what is termed nonexclusive contracts with some theaters, [570] under the terms of which we are granted the privilege of running certain ads up to certain limitations, the theater placing limitations as to the number that they will run.

[572] Q. Are you familiar with the theater screening agreements presently in force with your company — A. Yes.

Q. What is the length of time of the theater screening agreements, the so-called exclusive contracts?—A. Well, the guarantee exclusives, one, two, or three years; the no guarantee, that is, where we do not guarantee the theater any minimum amount of money, will run one, two, three and in some cases five years.

Q. And the nonexclusive contracts, how long will they run?—A. The nonexclusive contracts will run one two three and five recent

one, two, three and five years.

Q. On the average, what would you say about the length of term of the exclusive contract and the non-

exclusive contract with your company?—A. Well, I would say the average on the exclusive is about two years and the average on the nonexclusive is about three years. I make that statement based on the fact that we have approximately 4,600 theaters under contract and the records [573] show that in each of the past three years, that we have been called on to renew approximately 1,500 of those agreements during each of the three years.

Q. Or about a third?—A. About a third. During the current year—I was checking up the other day; and I noticed that we are being called on this year to renew better than 3,000 of our theater contracts

that have come up for renewal this year.

Q. Out of the 4,600?—A. Out of the 4,600, which I haven't been able to find out just the reason why, unless it just happens that back in 1946 and '45 we were very aggressive in acquiring theaters, and they happened to fall due this year.

Q. Now, when a contract is made on a nonexclusive basis, what is physically done to the printed form which contains the clause making it exclusive?—A. We merely scratch out the words which state that the exhibitor will not show advertising films that are furnished by any other than our company.

Q. And when the contract is made for a term of less than five years, what is done with the printed word "five" that appears in these contracts?—A. We scratch out the word "five" and substitute in its place one, two, or three, dependent upon whether it is a one-year, two-year or three-year contract.

[574] Q. Mr. Mabry, I want to show you the Commission's Exhibit No. 1, which is in the record and was prepared, as I understand, under your supervision and direction, is that corect?—A. Yes.

Q. There are six columns appearing on that exhibit, in addition to the name of the State. The first one says, "Total Theaters," for illustrative purposes, "Alabama, 318." From what source did you get that information?—A. Film Daily Year Book.

Q. Which is the best available information on the total number of theaters in the State?—A. That is generally accepted in the industry as being authentic information as published in the Film Daily Year

Book.

Q. In column 2 you have approximate number that now screen ads, 301 theaters. From where did you get that information?—A. Well, from contacts with the theaters, and I have a rate book, and from competitors' rate book quotations. That is, the number of theaters that would be offered a advertisers.

Q. In the next column, that is, column 3, appears "Number of theaters under contract to M. P. A., 249," in the State of Alabama.—A. I secured that infor-

mation by direct reference to our contract files.

Q. That figure, 249, includes all contracts, exclusive and nonexclusive, held by your company in that State?—[575] A. Includes all contracts held by my company, including both exclusive and nonexclusive.

Q. Column 4 says, "Number of theater contracts containing the exclusive clause, 143."—A. I secured that information by direct reference to the contracts.

Q. Column 5 has "Number of theater contracts calling for payment of actual time used, no guarantee, 221."—A. I secured that by a direct reference to the theater contracts.

Q. That figure 221, then, would include the non-exclusive as well as the exclusive contracts; 221, that means you pay for whatever space you use, without any guaranteed minimum, that is correct, is it?—A. That's right.

- Q. In the last column appears "Number of theater contracts calling for a minimum guarantee, 28."—A. Yes; "28" was secured by direct reference to the contracts.
- Q. The term "minimum guarantee," as I understand it, means that your company will guarantee a minimum revenue to the theater, irrespective of the number of ads placed on their screens?—A. That's right.
- [576] Q. Is there any difference in the practice operation of your business between the contracts which contain the exclusive clause in which no minimum guarantee is made by your company, and those in. which there is a minimum guarantee -A. We give a minimum guarantee to theaters that have theater space that we consider highly resalable, and those theaters because of the fact that they are receiving a minimum guarantee from us, usually will not accept ads from any other source. We have had some exceptions. The theater agreements which contain the exclusive clause but which do not give any minimum. guarantee, usually live up to the exclusive clause so long as we keep the number of ads sold that they want to run. If we fail to keep that number of ads sold, then it is the general practice of theaters to permit other film distributors or advertising film companies to sell such space as we have not been able to sella
- Q. And in that case, you mean you waive the exclusive clause and don't attempt to enforce it?—
 [577] A. We waive the exclusive clause. It is just the common practice in the industry to do so.
- [596] Q. Was it always the practice of your company to seek to obtain exclusive theater screening

agreements ever since you have been with the company?—A. Since January of 1925, it has been the practice to attempt to secure exclusive agreements with theaters that might be termed highly salable to advertisers. Those that we didn't consider too salable, we didn't offer them any guarantee. We would take an exclusive agreement if they offered it to us, of course.

[598] Q. Mr. Mabry, you personally handled the securing of theater screening agreements for M. P. A., did you, not?—A. For approximately the past 15 years; yes.

Q. During that time, you have already testified that your company attempted to obtain from theaters exclusive contracts to screen your film ads, correct?—A. Yes; and actually secured them.

Q. And in some cases you did. In going out to obtain these theater screening agreements from theater owners and managers, did you find in some cases that competition had the theaters under contract when you first called?—A. Yes.

Q. Were such contracts in some cases exclusive contracts, in which the theater screen had been leased to only one distributor?—A. Yes.

Q. How would you go about getting those screens for M. P. A.?—[599] A. Well, I would present various sales arguments to the effect that we could make more money for the exhibitor. That was the main one. To the effect that if he gave us a screening agreement, that we would provide him with a quality or standard of films which was superior to those he was then showing; that we maintained, or would maintain, a regular sales staff to work his theaters, and that he would be assured of a definite revenue month after month, and that by dealing with us only, that

we would eliminate the confusion that quite often arose when two or three different companies were selling ads for his screen.

During recent years, I would say the past ten years, when we have been able to get films that were produced by other producers, I pointed out to him the fact that through the present theater coverage we had and through our present extensive organization, that we were able to act as an exchange or distributor for producers, other producers of film, and that we had that film available for sale to advertisers, as well as the film which we produced, and by having this broad line of film or service to offer to advertisers, that we were in position to produce more revenue for him, or come nearer keeping his screen filled than those companies that did not have such an extensive library or service to offer. And, as a result, we were quite often quite successful in signing up exclusive agreements with theaters.

[600] Q. In the case of these minimum guarantee contracts, you found it necessary in those cases to offer the theater a minimum revenue, irrespective of the number of ads that you could put on the screen?-A. It is necessary to offer a minimum guarantee to most any individual theaters or circuit of theaters today that is popular with the merchants or salable to the merchants. There are very few first-run theaters that show ads today that will make an agreement with you unless you do give them some minimum guarantee.

^[604] Q. Mr. Mabry, you have stated that about 30 or 40 percent of the films displayed on the screens under contract are produced by others than M. P. A. ?-A. Yes.

Q. Can you expand that answer to explain that?—
A. Well, Mr. Rosen, we act as film exchange for advertising films, and the more films we can get from other sources, the larger our library service that we have to offer to advertisers. In other words, it gives us more to sell than if we relied only on the films produced by us.

Q. How do you make known that desire of yours to other producers?—A. We advertise nationally in trade publications. We keep [605] in as close contact as possible with other film producers and distributors and make it known to them that we would like to carry in stock, films produced by them, or that we would like to accept orders for display film on our theaters if they are able to get such orders, and that we would allow them the standard A. A. A. A. agency commission of 15 percent on any such business they placed with us.

Trial Examiner Kolb. Mr. Mabry, this 40 percent you mentioned, do you include in that the dealer-manufacturer cooperative film advertising, where the manufacturer has obtained the films from other sources?—A. Yes, sir.

By Mr. ROSEN:

Q. What proportion of that 40 percent would you say is comprised by the manufacturer-dealer program?—A. I couldn't answer that without referring to the cords.

Trial Examiner Kolb. That also includes national advertising?

The WITNESS. Yes, sir.

[606] By Mr. Rosen:

Q. Mr. Mabry, what has happened in the industry to those distributors who did not obtain any exclusive

theater screening agreements?—[607] A. From our observation, those that did not make exclusive agreements have all gone out of business.

By Mr. ROSEN:

Q. Why so?—A. They had no definite outlet for their product.

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CROSS-EXAMINATION

By Mr. Collins: .

Q. Mr. Mabry, you testified that those distributors who did not take the exclusive contracts had gone out of business, is that right?—A. Yes, sir.

- Q. Now, was that because they didn't have any theaters to get into?—A. No, sir; there were thousands of nonexclusive theaters they could get into, but nonexclusive theaters do not represent a definite market, and as a result, you cannot maintain or hold a sales force with all nonexclusive theaters, because it involves too great a risk on the part of the salesmen in time and traveling expense to properly cover those towns and those [613] theaters where they operate on a nonexclusive basis.
- Q. Well, the fact remains that all those who haven't got exclusive contracts have gone out of business?—A. Yes; as far as I know.
- [616] Q. Now, Mr. Mabry, in the theaters where you have exclusive contracts, do you keep the screens filled with advertising?—A. Not at all times, but I try mighty hard.
- Q. And the screens remain—that is, taking your advertising alone, if that was all the advertising shown on the screens, then the screens would remain about 40 percent empty, wouldn't they?—[617] A. Would remain about 40 percent empty?

Q. Yes.—A. No; I wouldn't say that.

Q. Didn't you testify that you invited in other distributors for about 40 percent of the business?—A. No, sir; I didn't testify that. I testified that about 40 percent of the films that I distribute are produced by other distributors, other film producers.

Q. Don't you have other distributors showing ad-

vertising on your screens?

A. Yes, sir; they book through me.

Q. And what percentage of your business would you say is that kind of business?—A. That is booked directly through me by other people?

Q. Yes.—A. I would say it doesn't amount to more than ten percent of my total business, because there are very few people that offer to book business through me. The fact is, I wish I could get some more. I could fill up the empty spaces on the exclusive theaters I might have.

Q. Then in the theaters where you have exclusive contracts, you still have empty spaces?—A. Yes, sir; but they are for resale to anybody that has a [618] product that would be acceptable to the theater or that would like to use our product.

Q. But those empty spaces are of no profit to you?—A. No, sir; that is why I would like to sell them.

Q. Mr. Mabry, I believe it has been the tenor of your testimony that you consider your product a superior product?—A. I would be a poor business man if I didn't consider my product superior.

Q. And you consider your services more efficient than the services offered by your competitors?—A.

Yes, sir.

Q. And the theater management relies on quality of service, does it not?—A. That is two of the con-

siderations that they rely on, but they rely on others too.

- Q. You are not willing to rely on straight-out competition on the quality and service basis, are you?—A. I am not willing—you mean in the procurement of the theater contracts, am I willing to rely on quality and service?
- Q. In the screen advertising business, exclusive of the exclusive contracts?—A. No; because the theater is in business to make money, and regardless of quality and service, unless I combine a money offer with that, that is, in some way comparable to the money offer that he can get from other people who have, a [619] service that might be almost as good as mine, I'm afraid I wouldn't get the theater contract.
- Q. But if all of the theaters were left open, don't you think that you would stand as good a show as anybody else in making money out of the business?-A. I don't think anybody could make any money out of the business, even stay in business, if all the theaters were open, because you couldn't maintain a library service, which is essential to continuing in business, you couldn't maintain a sales force, which is essential to continue in business. At the present time, we may have an exclusive town here and another exclusive one here and two or three nonexclusives between. By routing our salesman to this exclusive one, he has to go through the other one, so he will stop and check with the theater manager and will quite often find space open and quite often pick up a contract, which is to us a more or less supplemental source of income rather than a prime source of income.

Roughly, 75 percent of the volume of business that we do is on screens that will not screen ads for other people. The other 25 percent comes from that

large group of nonexclusive theaters that we are constantly fighting our salesman to work and which he doesn't want to work, because the risk in time and traveling expense is so great, and if I didn't have those exclusive towns to route him to so he would pass through the nonexclusives, I would never get him in there.

he knows that he hasn't got any competition to buck?—A. No, sir; he goes there because he knows he has something to sell. He has something definite to sell, he has certain spaces open. He carries with him—our salesman carries with him what I call a territory inventory. In that territory inventory he has a slip on every transaction in his territory, including here is a theater that allows, we will say, four or five ads; back of that he has a slip on each customer sold and the service schedule on that customer. So he can tell at any moment, by reference to this book, just what service is open in any town where we have an exclusive agreement. That isn't true on the nonexclusive agreements.

Q. Now you do, I believe, work with approximately, I believe you said, 200 theaters with which you did not have any contracts?—A. Other than a verbal agreement, and most of that 200, or at least a half of that 200, happen to be theaters that will not run ads for anyone else except us.

Q. And with those you have success without the existence of an exclusive contract, do you not?—
A. My verbal arrangement with those particular—

Q. (Interposing) I would just like for you to answer my question.—A. Yes.

[621] Q: And you have any number of theaters under contract which wouldn't do any business with

anyone else but you, even though you didn't have the contract, do you not, Mr. Mabry?—A. I stated I had approximately a hundred such theaters that I do business with on a verbal arrangement, which verbal arangement, in my opinion, is just as good as a written exclusive agreement.

Q. Well, you have any number, though, with which you have exclusive contracts, which would do business with you without the contracts, do you not?—A. I couldn't answer that, because I am doing business with them on a contract basis and I don't know whether they would do business on a noncontract basis or not. If I was a theater I wouldn't, because I would have no assurance of that definite income month after month.

Q. You did business with them before you got the contract, didn't you?—[622] A. With those particular

theaters?

Q. Yes.—A. No; I stated I had approximately a hundred theaters that would do business with no one else. I have approximately 200 who are on verbal contracts. The other theaters insist on a contract.

Q. And you did do business with them, though, before they insisted on a contract, did you not?—A. No,

sir.

Q. You didn't do any business with them?—A. Not the other 4,400 we are talking about.

Q. And with those you never had done any business at all?—A. Not until I got a contract with them.

[623] Q. Now, when you run screen films for others, on what terms do you run those advertising films?—A. On the standard A. A. A. A. commission rate of 15 percent commission and 2 percent cash discount.

Q. That is to all distributors?-A. That is to all

distributors and all advertising agencies. I look on another distributor as just another sales agency for me. Four A's stand for American Association of Advertising Agencies.

[852] W. HARDY HENDREN, Jr., was thereupon recalled as a witness for the respondent and, having been previously duly sworn, testified further as follows:

Direct examination (continued) by Mr. Cozad:

Q. Mr. Hendren, you have testified before in this proceeding, and if I recall correctly, it was in Colorado Springs?—A. Yes, sir.

Q. You are the president of the United Film Serv-

ice?—A. Yes.

Q. As I recall your testimony before, Mr. Hendren, you testified that you have exclusive theater screening agreements, the majority of them are for a period of two or three years, is that correct?—A. Yes.

Q. What length of time do your advertising contracts, or your contracts with advertisers, run?

A. Issued for one year.

[857] Q. I believe you testified before, but if you haven't, you do show screen advertising for all and any film advertising distributor so long as the product meets the standards required by the theater and so long as you have available space, is that right?—A. And so long as the length of the film falls within the limitation of our agreement with the theater.

Q. Would you give us the names of a few film advertising distributors for whom you have shown advertising films in theaters where you had the exclusive contracts?—A. For the Alexander Film Company, Reid-Ray Industries, the Motion Picture

Advertising Service Company, Inc., of New Orleans, A-V Carrier Service Company, the Bilack—I think they called themselves the World Sereen Advertising Company, of Omaha, and others. Offhand, I cannot remember their names.

Q. You have offered, have you not, to show film ads for the A & M Service?—A. Yes, we did.

[865] Q. Now, do all of your contracts with the advertisers expire on the same dates?—A. No, sir; because they are not sold on the same dates.

Q. And in your experience have you ever had contracts with advertisers that ran beyond the dates of your contracts with the theaters?—A. It is normal procedure for us to have contracts with the advertisers that run beyond the normal selling rights in our contract with the theater, but our contract with the theater provides that they will screen out to completion contracts that we have with the advertisers that have been sold prior to the termination of our selling rights.

[870] Trial Examiner Kolb. Now, I would like to go back to national advertising. I thought I knew what national advertising was, but I am confused. Will you define that for me?

The Witness. Well, I will try to define national advertising as it is thought of in connection with our industry, the motion picture advertising business.

In our business, there are three classifications of business, one is local advertising, which is the advertising we sell to the local merchant, to the local town for screening in local theaters.

The second is what we call our manufacturer-dealer advertising. That is a service where we sell a na-

tional manufacturer on producing a series of films that/are designed to sell the product he manufactures, and which product is retailed through dealers. Now, when that series of films have been produced then we go out through our sales staff and contact the dealers and we negotiate agreements with those dealers for the screening of those films in their local theaters. That is a manufacturer-dealer plan and sometimes that dealer [871] is told that, well, if you order the service for screening our local theaters, the national manufacturer will cooperate with you or participate with you in the cost of that screening service.

In other words, here is a contract, it calls for so many weeks of showing in a certain theater, the volume of the contract is going to be, we will say, \$250. Now, the manufacturer has authorized us to tell you that if you think well enough of these films to order them for screening he will pay fifty percent of that bill, you pay the other fifty percent. That is the manufacturer-dealer. The state national programs

Trial Examiner Kolb. Along that line, Mr. Turner testified with reference to the language you have just described whereby the manufacturer induces the

dealer himself to cooperate in the plan?

The Witness. They do assist us through the publication of promotion broadsides, dealers' meetings, and so forth, it is much to their advantage to have the dealers match dollars with them for the screening of films that are promoting the manufacturer's product, because by so doing, if they can persuade their dealers to match dollars with them then they will create two dollars for each one dollar that it costs the manufacturer of the product.

Now, the third division is what we call national [872] advertising, and that is where a large national

advertiser, whose product is distributed, not by franchised dealers, but by many dealers in a town, as for example, Alka-seltzer, that is sold by every drug store in town, the manufacturer will have a series of films produced to advertise his product, and then he will place orders direct with us for the distribution and showing of those films nation wide, and he will pay us direct.

Trial Examiner Kolb. If your Alka-seltzer manufacturer arranges for a cooperative deal with his local distributors, that then ceases to be national advertising and becomes manufacturer-dealer adver-

tising?

The WITNESS. Yes.

Trial Examiner Kolb. So it depends upon whether he is cooperating in the advertising, the local dealer?

The WITNESS. Yes; if field contact is necessary by our sales staff with the dealers then it will be a manufacturer dealer program, but if that field contact is not necessary—of course there are exceptions, but usually it doesn't carry the name of any local dealer because the manufacturer's film that is advertising his product is sold by many local dealers and not by just one.

[926] Monty Mann was thereupon called as a witness for the Respondent, and having been first duly sworn, testified as follows:

Direct examination by Mr. Burgess:

Q. Where do you reside, Mr. Mann?—A. 4537 Lorraine, Dallas.

Q. In what business are you engaged?—A. Tracy-Locke Advertising, an advertising agency.

Q. What is your official connection with the agency A. I am vice president and media director.

- Q. What is a media director?—A. A media director is a man or woman, as the case may be, who coordinates the advertising media traffic for an advertising agency. He is the liaison between the agency and the advertising media, that is, newspapers, posters, and so forth, he negotiates for time, space, he studies and analyzes the [927] problems of the client, and fits the media into those problems.
- Q. In your business as an advertising agency, do you have occasion to use film advertising?—A. Yes, sir.
- Q. Do you, in that business, handle any advertising work for large national accounts?—A. We do for the Dr. Pepper Company.
- Q. How long have you handled the Dr. Pepper account on a national advertising scale?—A. The account itself since 1925.
- Q. And how long have you used screen advertising in connection with that account?—A. Approximately since 1934 or 1935 or 1936, I can't remember the year.
- [928] Q. Is it necessary, and are you supplied with rate books of the various advertising film companies?—A. We are. I would like to elaborate on that, if I may.
- Q. How do you use those rate books?—A. Well, in using any rate book, including books for film advertising, we must know what theaters are available in case of film advertising, where they are located, what the average weekly attendance is, and what the rates are, otherwise, we are unable to calculate in advance what it might cost our clients, and any media we cannot determine that in connection with we are

unable to recommend, because advertising, as any commodity, must be a known factor, you must have information [929] in order to be able to use it.

Q. Now, when you set up the film advertising program for Dr. Pepper, who pays the cost of the film?—

A. The Dr. Pepper Company.

Q. And then who pays the cost of the distribution and screening of the film?—A. That is a three-way proposition. In some cases, depending on the amount of budget available, and on the type of job that Dr. Pepper Company is able to do with those bottlers, in some cases they pay the full cost, in some cases the bottler pays the full cost, in others, they share the cost between them.

Q. When you said "they," the first time, you meant the Dr. Pepper Company itself?—A. Yes, sir.

Q. In some cases pays the entire cost?—A. Yes.

Q. Now, where is the film obtained for those programs?—A. We obtain the film from a motion-picture production company, in some cases we have obtained them from the U. S. Motion Picture Company of Hollywood, in other cases we obtained them from the Jamerson Film Company of Dallas, we have bought some from Alexander Film Company of Colorado Springs, and I believe one year Cinecolor did our job. However, their processes, I don't believe, actually produced the commercial films, they have somebody else's negative and produce the prints from it.

Q? Who handles the distribution and screening of the Dr. Pepper Film Advertising program?—A. The Motion Picture Advertising Service Company at New Orleans, United Film Ad Company of Kansas City, Alexander Film Company, Colorado Springs, and the outfit named Cauger, I forget where they are located. [931] Q. You do not have arrangements with any one of the film companies to handle the over-all picture of the campaign?—A. We do not have.

Cross-examination by Mr. Collins:

Q. Now, getting at this advertising, Mr. Mann, do you ascertain from MPA how many theaters they service?—A. Yes; in other words, each company furnishes us with that information.

Q. And the United furnishes you with that infor-

mation?—A. Yes, sir/

Q. And Alexander furnishes you with that information?—A. Yes, sir.

Q. And Cauger furnishes you with that information?—A. Yes, sir.

Q. Now, then, do you contract with each one of those different companies nar 1 to service the theaters for you?—A. Yes, sir; directly.

Q. You don't have any other dealings with any other companies?—A. We don't at the present time.

Q. Now, had you tried dealings with other companies?—A. Yes, sir; we have. May I elaborate?

Q. Yes?—A. We have, on occasions where those companies have had theaters and areas in which we were interested.

Pames?—A. Ray-Bell is one.

Q. Ray-Bell?—A. Yes, sir.

At the moment, I can't think of the others, because they [933] are not fresh on my mind, we haven't had occasion to do business with them.

Q. Now, why is it, Mr. Mann, that you do not use other dis-[934]tributors than those you have

named?—A. Simply because insofar as we know, we have rarely, if ever, been approached by any other distributors notifying us of their existence or their

desire to service any of our accounts.

Q. And, do you believe that you get a complete distribution in or coverage with these distributors that you have named .—X. Yes, sir; insofar as we are able to ascertain. Among those several distributions, we can have access to all of the theater houses that we could possibly use in connection with our activities, under the present size of the account.

Q. And you don't know of any other distributors with facilities which these distributors have?—A. No,

sir; I don't.

Q. That could supply you with the coverage that they can?—A. That is correct.

- Q. Now, for what period of time, what period of time does your contract cover with these different distributors?—A. Each contract that we face usually covers the period of one year, it may call for service every week, or on all alternating weeks, or on every third or fourth week, as the case may be, during that year. Then it is either renewed or changed or discontinued at the end of that year. Incidentally, we make a separate contract for each Dr. Pepper operator of which there are some 425.
- [935] Q. Now, do these different distributors with whom you have contracts, supply you with individual listings and rates?—A. Yes, sir.
- Q. Do you find that Alexander Film Company sends you a statement for filming or screening these films, in theaters that are listed in the rate book furnished you by MPA?—A: On some occasions; yes. If I may elaborate on that, the reason is because there are a good many theaters in the United States for which

any film distributor may place a contract, and/so a number of them are listed as common houses, open [936] houses, to anybody or to everybody.

Q. Listed as open houses to anybody .- A. Yes,

sir.

Q. You mean that the MPA supplies you with a rate book which includes houses that are open to any distributor at all? A. Surely, why not?

Q. So far as you know, that it is true, is it not?-

A. Yes, sir.

Q. And would you say that the Alexander Film Company includes in its rate books, theaters which are open to any and all distributors?-A. Yes, sir; otherwise we would have no way of getting theinformation.

Q. Cetting what information, now, Mr. Mann?-A. Names of theaters, weekly attendance, location,

sizes of houses, rates.

Q. Well, now, does the Alexander Film Company inform you that these theaters are open to any and all distributors?—A. I don't know that they make a point of doing it; in other words, let me explain this-maybe I am getting out of line, maybe I don't know court procedure, and I apologize for getting out of line if I do; but in our business, what we are interested in is getting the information. It doesn't make a bit of difference as to who handles the business, just so we can buy for our client. We represent the client when it is [937] in his interest, and we perhaps do not delve that deeply into the thing.

Q. Well, isn't this right, Mr. Mann, that so far as. you know the theaters, the names of which are supplied to you by the United, are open to United only?-A. Again, I will have to say I think not. I think that every film company that puts out a manh

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ual tries to make it a complete service, because in

addition to any selfish interest that they may have—and don't we all have selfish interests—they want us to furnish a complete service to the advertisers, and it is my impression that if they do not put out such a manual, then they are passing up a lot of business that they could have otherwise.

Q. Well, now, Mr. Mann, I appreciate very much getting your impression; but now, then, the thing that I am getting at, and what we are all trying to get at, are the facts, which causes us to form an opinion or give us an impression; now, the things that I am trying to get at now are the facts. Now, I want to know the facts that you have available to you which causes you to form the opinion that all the theaters which Alexander lists in its rate books, are open to any and all distributors?—A. I didn't say that, sir. I didn't say that all the theaters they list are open to all distributors. I said I am sure that they list all the theaters in their rate book, in [938] cluding those which are open to all distributors, if that is the way you asked the question.

Q. You are, then, of the opinion that would cover all theaters in the United States, would it not, that show screen advertising?—A. I am of the opinion that

it does.

Q. And that is the kind of rate book that Alexander

supplies you?-A. That is right.

Q. Is that the same type of rate book that is supplied by the others, the other distributors which you have named?—A. I am not sure, again, I know that a similar rate book supplied by MPA would probably show the same thing, about the others, I couldn't say.

Q. Well, Mr. Mann, if—A. Let me state it this way, if I may? If we were to request such a book from any film distributor, I am almost positive that they would furnish it.

Q. Have you ever requested it?—A. We never have, because we have never felt the need to.

Q. And you have nothing on which to base that opinion, have you?—A. Yes; I have. There is an agreement, as far as I know, between the Standard Film companies—that is a general term, so maybe you had better take it out—there is an agreement—[939] and if it does not still exist, then I am badly misinformed. This agreement provides a standardization in this media, so that there apparently is no possibility of one film company doing a better job than anybody else, on this particular distribution factor. If there were, then conceivably one film company would get all the business.

[950] Forrest Dunlar was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct examination by Mr. Rosen:

Q. Where do you live, Mr. Dunlap?—A. Dallas, Texas.

Q. What is your business?—A. In the theater business and the theater chain business.

Q. Do you own and operate any theaters?—A. Yes, sir.

Q. How many?—A. Well, I have owned and operated sixteen, I don't have quite that many now, small town theaters.

Q. What is the name of your company?—A. Dunlap Theaters.

Q. How long have you been engaged in the theater bysiness?—A. Well, I have been connected with the industry about twenty-five years. I have been operating my own theaters about twelve years.

[951] Q. Have you ever had any experience in connection with exhibiting motion-picture advertising on the screens of your theaters?—A. Oh, yes. Yes.

Q. When did that start?—A. Oh, I was using it back before the sound days, that is ten or twelve years

ago.

Q. When you started out having advertising films on your screen, was the screen contracted to one distributor, or was it been to more than one?—A. No, sir; it was wide open.

[957] Q. There is no minimum guarantee under the present arrangement?—A. No.

Q. So that you started out about ten years ago with advertising A. Yes, sir; ten or twelve years ago.

Q. So, for about seven you ran it on an open

basis ?- A. That is right.

Q. About three years ago you started to run it on an exclusive basis?—A. Yes, sir.

Q. First with Alexander, now with MPA?—A. Yes; three or four years ago, I don't know exactly.

Q. Has the change of policy proved to be satisfactory to you?—A. Very muchly so.

Q. Why?—A. I get more revenue.

[961]

CROSS-EXAMINATION

[967] Mr. Collins. Now, you said that your contract with the MPA was for one year?—A. Yes.

Q. Now, why do you limit your contract to one year?—A. Because I might want to change the next year, I might not want to do business with MPA than next year.

Q. Do you find that as a general rule a sufficient length of time to satisfy the advertisers?—A. Well, let me explain, more of the advertisers will only buy advertising for from four months to six months at a time, they won't buy for a total year, and we change around among different ones.

Q. From the nature of the business and everything, do you consider that a sufficient length of time for you and also for the distributor?—A. One year's time, then I can go with someone else if I want to.

Q. Now, since you have been with the MPA, have you had your screens filled all the time?—A. When I made exclusive with them, they were not filled, but they have kept them filled for me ever since.

Q. Ever since that time they have kept them

filled?—A. Yes, sir.

Q. And do they send you the advertisements for your approval, before you show them on the screen?—[968] A. No, sir; they send them over to the theater each month—each week.

Q. And you don't look over them beforehand?—

Q. Now, during this time, that the screens were open, with what distributors did you deal?—A. Alexander and MPA, and a concern that was here in Dallas. I have forgotten, they are out of business, I believe.

Q. During the period, or the terms of this contract that you have with the MPA, do you permit any other distributors to screen any advertising on your screen?—A. No; I have an exclusive contract with them for one year.

[989] BERT E. GRAETZ was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct examination by Mr. Rosen:

[990] Q. Mr. Graetz, you are now employed as the District Sales Manager for MPA?—A. Well, my proper title is Divisional Sales Manager.

Q Divisional Sales Manager?—A. Yes, sir.

Q. For what territory?—A. For Texas, New Mexico, and Arizona.

Q. How long have you been employed by MPA?—A. I would say approximately a little better than thirteen years.

Q. Had you been in the motion-picture advertising

business prior to that time?—A. Yes, sir.

Q. For whom?—A. I was employed by Alexander Film Company for a period of perhaps two or three years.

Q. Where did you start out with MPA?—A. I started as a salesman for MPA in the state of Tennessee.

[991] Q. Did MPA at that time have any theater screening agreements with any theaters in Tennessee in the territory you were working?—A. Very few.

Q. What were your duties in Tennessee with regard to selling?—A. My duties, when I went to Tennessee, were to acquire the screening rights to theaters, then also to sell the advertising to fill those spaces.

Q. Which came first, in the matter of timing?—A. Well, I had to contact the theater owners before I could sell any ads.

Q. Why?—A. Because you can't—the salesmen wouldn't go out to sell an ad unless he has a certain commitment and he knows that ad is going to be hown after it is sold.

Q. At the time you started in Tennessee, did MPA have any open screens that it was working which were under nonexclusive arrangements?—A. Yes, sir.

Q. In those cases, you mean the theater would show advertising, not only for MPA but also for com-

petitors?—A. Yes, sir.

Q. Were you able to sell advertising to service those screens at that time?

[992] A. I sold to some extent, it was quite an effort to sell them, but I did sell them.

Q. What were the difficulties that you, as a salesman, encountered with regard to selling advertising for theater screens that were open to more than one distributor?

A. For a salesman to work entirely, or practically all theaters, that are nonexclusive, there is too much effort of several different men trying to fill that same screen.

[994] Q. All right. Then when you were in Tennessee, what did you do to cure that situation?—A. I eventually, after a certain length of time, I contacted a large circuit of theaters and signed an exclusive agreement, acquired exclusive rights for MPA.

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Q. What was the name of the circuit?—A. That was the Crescent Amusement Company, Nashville, Tennessee.

Q. What kind of a contract did you get, then, for the whole [995] circuit?—A. I get an exclusive contract for all of their theaters, which covered the greater portion of Tennessee and a part of Kentucky.

AQ. And then what happened with regard to your

ability to sell advertising there, and how you serviced those screens?—A. Well, we were—we were very successful, and we managed to fill all those screens, and brought the business of Tennessee and Kentucky from a very, very small business, up to a very substantial business.

Q. At the time you went into Tennessee, am I to understand that MPA had no exclusive screening rights in Tennessee with any of the theaters at all?—A. No, sir; not to my knowledge.

Q. You mean they didn't have? -A. They had none.

[996] Q. What business did MPA have in Texas, or when you were appointed Divisional Sales Manager—I am talking about in regard to theaters?—A. Their business in the State of Texas at the time I took it, they had a very, very small business, I employed one salesman at that time, and he operated, with my assistance, and managed to secure just a little business, that is the only way we could get anything.

- Q. Is that the way you built up the business here?——A. Yes, sir.
- Q. And the first thing you have to do to build up the busi-[997]ness, as I understand, both in Tennessee and Texas, was to sign up some exclusive contracts?—
 A. Yes, sir.
- Q. Do you run into any competition in the State of Texas and Arizona and New Mexico in the securing of screen privileges?—A. Yes, sir.

[998] Q. Who are the competitors?—A. Alexander Film Company is naturally, we consider, our largest competitors.

Q. Any others?—A. But there are other small independent firms that have a few films they might sell to theaters that they can get to run them. If they can have the theaters run them, they are glad to do it.

[1000] Q. Are all of those we are speaking of signed

up on an exclusive basis?-A. Yes, sir.

Q. With terms running what—one, two, or three years?—A. Usually one year, two years or three years. Some of them sign up for as much as five years, but in most cases they asked me to reduce it to one or two years, which is all right.

Q. The longest term of any of them is five?—A. I.

think the longest term.

Q. And the shortest is one year?—A. Yes.

[1001] Q. You would say on the average it would run about two or three?—A. I would say about two.

Q. Now, in selling advertising, how long do those contracts generally run?—A. They usually run over

a period of twelve months.

Q. You mean when you go in to sell a local advertiser, he would generally sign up for advertising over a twelve-month period?—A. In the majority of cases, I would say about twelve months, I have on occasions sold a six-month contract or a shorter period of time, if necessary. Most of them are a year.

[1006] Cross-examination by Mr. Collins:

Q. Mr. Graetz, before you entered into these exclusive contracts with these theaters, they were open to any and all distributors?—A. Some.

Q. Some?—A. Some of them were.

Q. And some were not?—A. Some were under exclusive agreements to perhaps one of our competitors.

Q. Now, when you entered into these exclusive agreements, were these theaters showing any advertising films under agreements with other distributors ?- A. Yes, sir.

Q. And under the terms of your agreement, they had to stop [1007] showing advertisements in those theaters?-A. They had-according to our agreement, our exclusive agreement, I may answer that in my own way?

Q. Yes. A. According to our exclusive agreement, after the expiration of whatever the terms of their agreement is, they must cease taking any new con-

tracts or renewing any such.

Q. They can show out ?-- A. They can complete their contracts.

Q. And then after that?—A. They cannot renew it.

Q. They cannot renew it to show any more? A. That is right.

Q. Now, I believe you said that your contracts ran one, two and three, and up to five years?-A. That is right.

Q. What percentage would you say are one year? ---A. Well, I would say that the biggest percentage of them, the biggest percentage is one year.

Trial Examiner Kolb. Are these theater screening

agreements you are talking about?

Mr. Collins. No; I am talking about the agreement between MPA and the theaters.-A. That is right, theaters agreement, is what we had reference to. [1008] Q. Yes.—A. I would say that over fifty percent of them are one year.

Q. And you find that sufficient for the existing conditions?—A. I think so; yes. He has the privilege of changing after the expiration of that year, to some other competitor firm, if he so desires.

[1043] • Direct examination by Mr. Burgess:

Q. Will you give your full name, Mr. Forsythe?—
A. Earnest Hugh Forsythe.

Q. Where do you reside?—A. 601—I mean 201

Burr Street, Houston. .

Q. In what business are you engaged?—A. Well, I guess you would call it theater coowner or manager. Me and my wife own the theater.

[1044] Q. In connection with your theater business do you handle screen advertising %—A. Yes, sir.

Q. Have you had occasion in the past to handle screen advertising for Theater Publicity Service?—A. Yes, sir.

[1045] Q. What was your arrangement with Theater Publicity Service as to when they should pay you for screening?—A. Well, the contract called to be paid, you know, on the first of the month but when I was running the ad they paid me every week. That is how come me to run it six weeks without trying to find out anything about it because I figured they would pay me after it run a month, and I run it for six weeks and I still had not received any check for them or heard from them.

Q. Then what did you do?—A. Then I called them and their phone was temporarily disconnected and I tried to find out what was the matter and I couldn't find out, so I took the ad off the screen.

Q. Did you ever put the ad back on the screen?—A. No, sir.

Q. Were you paid for the six weeks' service that you had run?—A. No, sir.

Q. You had been paid for the prior six or seven weeks?—A. Yes, sir.

Q. At the beginning? Have you at any time been paid for the last six weeks that you ran it?—A. No, sir.

[1046] Cross-examination by Mr. Collins:

Q. Is that the only motion-picture advertising that you have carried?—A. No, sir; I carry with four different companies.

Q. Four different companies?-[1047] A. Yes, sir.

Q? What four different companies do you carry the—A. Alexander and the MPA and this Publicity outfit and Town Talkies.

Q. You don't have any contract with any of them, only just for the specific advertising, is that it?—A. That is all, just advertising.

Q. And your theater is open to all?—A. Yes, sir.

Q. And the present arrangements have proven entirely satisfactory to you?—A. No, sir. Do you mean—just how do you mean that, being satisfactory? Do you mean with different companies?

[1048] Q. Yes; with the exception of this particu-

lar company.—A. Yes, sir.

Q. Have you ever had any exclusive contracts with any of them?—A. No, sir.

[1112] CARL J. MABRY was thereupon called as a witness for the Respondent, Motion Picture Advertising Service Company, Inc., and, having been previously sworn, testified as follows:

Direct examination by Mr. Rosen:

[1114] Q. What are the contracts that your company has averaged as to their term?—A. They average about three years at the present time. The fact is, half of them are three to five years, and the other half, I believe, are less than three years. They average about three years, but we work to get five-year contracts where no guarantee is involved. If a guarantee is involved, then we sometimes have to limit that because we don't want to take the risk.

Q. In those cases what would you say the term would be, with the guarantee?—A. Usually we try to get three years, two to three years.

[1116] Q. Well, you say that most of the advertising contracts are made for a year, either to run every week or every other week?—A. Every week or every other week schedule.

Q. Is it possible in those cases to display the advertising exactly over the term of the advertiser's contract, what I mean is, does it take longer than a year to display advertising where the advertiser's contract calls for a year's run once a week for 52 weeks?—A. No. On a library service it takes about 60 days to get the advertiser's contract started, which means that it would take 14 to 15 months to complete his deal. On a special film service where you have got to produce special films for the advertiser it might be from six months or maybe even a [1117] year after you sign the advertiser up before you could actually start him.

Q. And in the case of a special film, if it called for 52 weeks and you had a special film it might take, say, something over 18 months, you mean, to run?—A. Eighteen months to two years.

Q. What I was asking you was this: Even in the case where it called for one display each week for

52 weeks of a syndicated film, doesn't that advertiser in some cases have to wait his turn to get on the seveen if you are already filled up, so that you can't actually run that out right from the minute of the contract for the next 52 weeks?—A. No; unless he enters into that agreement. We control that to a certain extent by not letting our salesmen sell space that isn't available.

[1118] . *Cross-examination by Mr. Collins:

[1119] Q. Mr. Mabry, when you take a contract with a theater and another distributor has advertising arrangements with the theater to screen advertising films it is understood that the theater will screen those advertisements out to the extent of the agreement, isn't it, to the time limit of the agreement?—A. Do, I understand you to mean that when I acquire a theater do I have in my agreement with that theater provision whereby that theater can run to completion advertisers' contracts that are already sold?

Q. Yes.—A. Yes, sir.

[1120]

Q. Well, now, you said something there about the other distributors' selling period had expired. When does the selling period expire?—A. It expires when the contract expires, when the theater contract expires. Say, for example, a theater makes a contract for one year starting January first and expiring December thirty-first, the company holding that contract can sell right on up to December thirty-first.

[1121]

Q. So your contract with the theater, then, really refers more to the selling period than it does to the screening period, doesn't it?—A. To an extent. It all.

depends on the run out that the theater allows. If the theater allows you a run-out period of 60 days, then the two of them about run concurrently, but if he allows you a run-out period of, say, a year, which we encourage because we naturally want to sell contracts right up to the end of our contract, then the servicing period might run a year beyond the expiration of the agreement.

Q. And are those run-out periods set forth in your

screening agreement?-A. Yes, sir.

[1122] Q. Now, what percentage did you say of your contracts were for five years?—A. About 25 percent. You have that in the records, Mr. Collins. I gave you a list of it. It is approximately 25 percent. Q. Well, the reason that I was inquiring about it, I thought you had the information at hand. You were testifying from something.—A. Yes; I do. I have if here. It is 25 percent.

Q. Now, you say that you are trying to get increases all along, that is, you are trying to get your contracts for a period of five years instead of the one year?—A. Yes, sir. That is very sound business.

Q. Now, it was over a year ago or right at a year ago since we got that information with reference to percentages in [1123] the record. Now, have the percentages changed since that time?—A. It might have changed slightly. In other words, we would pay possibly 5 percent, or something like that. It might be up as high as 30 percent now.

Q. Some of it has increased, that is, the long terms have increased, and have you had decreases in some

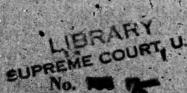
cases?—A. In the long terms?

Q. Yes. Haven't you had it where the terms have decreased?—A. No. We are working toward the end?

of increasing the length of those contracts, Mr. Collins, so that we can build a better service.

Q. Well, I am not questioning the proposition that you are working toward that end, but I am asking you as a fact if any have decreased?—A. If any of the terms of my contracts have decreased?

Q. If any of the theaters with which you have had long-term contracts have asked that the terms be decreased?—A. There probably have been some cases, but I would say the cases of where the term has been increased far outnumber the ones where it has been decreased, because that it is our sales policy.



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MAY 2 0 1952

CHARLES ELMORE CHORLES

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, PETITIONER

MOTION PICTURE ADVERTISING SERVICE COMPANY,
INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT



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Inthe Supreme Court of the United States

OCTOBER TERM, 1951

No. 786

FEDERAL TRADE COMMISSION, PETITIONER

.11.

MOTION PICTURE ADVERTISING SERVICE COMPANY,
INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled cause on February 21, 1952.

OPINION BELOW

The opinion of the court of appeals (R. 147) is reported at 194 F. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1952 (R. 152). The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

- 1. Whether the use of exclusive dealing contracts with theatre exhibitors by a producer of advertising motion picture films, found by the Federal Trade Commission to have "injurious effects" upon competition and a "tendency to monopoly," may constitute an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.
 - 2. Whether such exclusive dealing agreements were exempt from the Federal Trade Commission Act as "agency" contracts under the rule of Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568.
- 3. Whether the order of the Federal Trade Commission requiring respondent to cease and desist from executing or continuing such exclusive dealing contracts, for periods of more than one year, represents an abuse of the Commission's discretion to formulate appropriate remedies for correcting unfair methods of competition.

STATUTE INVOLVED

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 717, 719, 15 U.S.C. 45, provides in part:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The court below has set aside an order of the Fed-) eral Trade Commission prohibiting respondent from entering or maintaining certain types of exclusive dealing contracts. The proceeding before the Commission was instituted by a complaint filed by it in May, 1947, charging Motion Picture Advertising Service Company, Inc. ("MPA") with, unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. MPA is engaged in the business of producing, selling and leasing motion picture advertising films. It executes contracts with advertisers, both national and local, under which it furnishes the films and arranges for their exhibition. MPA also contracts with theatre exhibitors to have them show the advertising films in return for payments by MPA. A "substantial number" of MPA's exhibition contracts provide that the exhibitor will show only MPA films (R. 109). This exclusive dealing feature of the contracts was the gravamen of the Commission's complaint.

Following extensive hearings before an examiner, the Commission on October 17, 1950, issued its

findings, conclusion and order. On the basis of the evidence adduced at the hearings, the Commission found:

As of August 1, 1947, MPA had screening contracts covering 4096 theatres in 27 states and the District of Columbia: It had exclusive dealing agreements with 2493 of these theatres. MPA is one of the four largest companies in the business.² Together, these four companies had exclusive dealing contracts covering approximately 75% of all theatres which show advertising films.³ (R. 110-111.)

MPA's screening contracts with exhibitors run for periods of from one to five years (R. 108).

¹ The trial examiner filed a recommended decision in which he conclud d that the exclusive dealing contracts for a period of more than one year were in violation of Section 5 of the Federal Trade Commission Act (R. 72-101). He recommended that the Commission prohibit MPA from entering into any such contracts (R. 102). Exceptions to the examiner's recommended decision, briefs, and oral argument before the Commission were waived (R. 103).

² The Commission has also filed complaints against the other three major companies. Identical cease and desist orders were ultimately issued in October 1950 against all four respondents. All filed petitions to review, but only MPA and one other company (United Film Advertising Service) prosecuted their actions. United's suit is pending in the Eighth Circuit, but, by stipulation of the parties entered prior to judgment in the instant case, the judgment herein will also be determinative of United's case. The cease and desist orders directed against the remaining two companies have now become final, i.e., non-reviewable, by operation of law (15 U.S.C. 45(g)).

There were approximately 20,306 theatres in the United States as of that date. About 12,676 exhibited advertising films. The "Big Four" had exclusive dealing contracts covering 9,426 theatres. (R. 110.)

About 25% of the agreements are for the longest period; the majority are for one or two years (ibid.). MPA's contracts with advertisers run from 13 weeks to one year, but one-year contracts have become the standard practice (ibid.). Because the advertising contract is generally negotiated after the screening contract has been obtained, the duration of the two contracts often is not coextensive (R. 109). In such cases the practice is for the theatre to complete the showing of the advertising films covered by MPA's contract with the advertiser even though its own screening contract with MPA has expired (ibid.).

In the case of local advertisers, MPA generally supplies a film playlet from its film library (R. 107). To this is added a brief trailer identifying the particular advertiser (ibid.). For national advertisers, however, specific films are produced advertising the particular product and the advertiser bears the cost of producing the film (ibid.). Only about 60% of the country's motion picture theatres accept film advertising, and those which do show only a limited number of advertisements, varying from three to six at each show, because of the adverse audience reaction to an excessive number (R. 111).

In many instances theatres prefer to enter into exclusive dealing agreements, and such agreements give the advertiser assurance of exclusive use of the screen during the term of the contract (R. 112-113).

MRA's use of exclusive screening agreements has prevented competitors from showing their films in the theatres covered by these agreements and has thereby limited the outlets for their films in a field which in itself is more or less limited (P. 111). This has had the effect of forcing some competitors to go out of business (ibid.). The injurious effect upon competitors, and the tendency to monopoly inherent in MPA's use of exclusive agreements, have been materially and cumulatively increased by the use of like exclusive agreements by the other three principal companies in the business (R. 111-112).

The Commission concluded that MPA's use of exclusive screening agreements which run for a period of more than one year constitutes "an unreasonable restraint and restriction of competition," and that prohibition of such contracts is required in the public interest (R. 115). It concluded that the fact that such agreements may aid the respondent in building up its business is not controlling where, as in the circumstances here, such agreements have the effect of unduly hindering, lessening and injuring competition (R. 113). The Commission also concluded that since advertising

⁴ The small companies characteristically do not produce their own films or maintain film libraries. A typical small operator first seeks to obtain space from a theatre. If successful, he then solicits advertising, usually from local merchants. He obtains playlet films from a library, to which are added name trailers. The small companies ordinarily do not seek or obtain exclusive screening rights (Commission's App. 6-7, 98; MPA's App. 24).

contracts for a period of one year have become "standard practice in the trade," since the definite availability of future screen space facilitates the securing of advertising contracts, and since film advertising space in theatres is limited, exclusive screening agreements for periods not in excess of one year are not an undue restraint upon competition (R. 114).

The Commission accordingly ordered MPA to cease and desist from (1) entering into any contracts giving it the exclusive privilege of exhibiting advertising films for more than one year, or (2) continuing in effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends more than one year beyond the date of service of the order (R. 116-117).

In an accompanying opinion the Commission stated that its "corrective action" is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of MPA's competitors (R. 123). The Commission also pointed out that its action does not impinge on MPA's right to contract for screen space for extended periods on a non-exclusive basis "under circumstances which do not unduly hinder competition" (ibid.).

The Commission subsequently denied MPA's motion (R. 129-134) to modify the cease and desist order by eliminating the prohibition on continuation of exclusive dealing agreements whose unexpired term extended for more than one year (B. 140-144).

The court of appeals, in setting aside the Commission's order, held that the proof failed to establish that MPA's exclusive dealing agreements were "unfair" methods of competition or that their prohibition would be "in the public interest" (R. 151). The court further held that the Federal Trade Commission Act did not enlarge or change "the definition of unfair methods of competition as laid down by the courts prior to its enactment" (ibid.). It stated (R. 151-152):

Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such that prospective screen advertisers require an assured outlet "for a reasonable time," MPA's use of exclusive contracts for periods longer than one year "was not unfair or unreasonable, but was rendered de-

⁶ The court subsequently indicated that it was of the opinion that increasing the amount of screen advertising is not in the public interest, but the court stated that it was not dismissing the proceeding upon this ground (R. 151).

sirable and necessary by good-business acumen and ordinarily prident management" (R. 152).

The court also appears to have rested its decision upon the further ground that the contract between MPA and the theatre owner is a "contract of agency" covered by the decision of this Court in Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568 (R. 151).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

- (1) In holding that the Commission had erred in determining that MPA's use of exclusive screening contracts extending beyond the period of one year constitutes an unfair method of competition.
- (2) In substituting its own judgment for that of the Commission as to whether MPA's practices are "unfair" methods of competition.
- (3) In holding that a practice is not an unfair method of competition if it is "rendered desirable and necessary by good-business acumen and ordinarily prudent management."
- (4) In holding that the contract between MPA and the theatre owner is a "contract of agency" governed by the holding in Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 643.
 - (5) In holding that the common-law concept

⁷ The court did not pass upon MPA's contention (R. 8) that a prior Commission proceeding was res judicata of the instant case. This contention was presented to, and rejected by, the Commission in a separate opinion issued early in the proceedings (R. 25-29).

of unfair competition fixes the scope of the prohibitions of "unfair methods of competition" in the Federal Trade Commission Act.

(6) In setting aside the Commission's cease and desist order and dismissing its complaint.

REASONS FOR GRANTING THE WRIT

1. The decision below appears to be primarily grounded upon an erroneous interpretation of the meaning and scope of the term "unfair methods of competition" in Section 5 of the Federal Trade Commission Act. This statute was enacted for the purpose of vesting the Commission with "adequate powers to hit at any trade practice * * * which restrained competition or might lead to such restraint if not stopped in its incipient stages." Federal Trade Commission v. Cement Institute, 333 U.S. 683, 693.

We submit that the present case manifestly comes within the ambit of the Commission's statutory powers as thus defined. The Commission found, and the record establishes, that MPA's exclusive dealing contracts have excluded its competitors from a substantial segment of the market for advertising films. These agreements remove from the market 2,493 theatres, or approximately 40% of the total number of theatres (6260) displaying advertising in MPA's market area. In terms of the entire market, MPA's exclusive contracts have closed to competitors approximately 20% of the 12,676 theatres which display advertis-

ing films. The exclusive dealing agreements of MPA and the three other industry leaders have closed to competitors some 75% of the total market. None of these findings was questioned by the court below.

In a variety of situations, this Court has sustained the power of the Commission to prohibit as unfair methods of competition practices which tend to eliminate competitors, monopolize trade, or restrict opportunity to deal in a free market.8 Clearly in this case, prohibition of the exclusive dealing agreements, found to have "injurious effects" upon competition and a "tendency to monopoly," was well within the Commission's statutory power.

The interpretation which the court below placed on the Trade Commission Act, that it applies only to practices coming within the common law concept of unfair competition, is directly contrary to the holding of this Court in Federal Trade Commission v. Keppel & Bro., 291 U.S. 304. It was there held (pp. 310-311), upon a careful review of legislative history, that Congress adopted the "broader and more flexible" phrase "unfair meth-

^{**}Among the practices of this kind which this Court has held to constitute "unfair methods of competition" have been: boycott of competitors (Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457); multiple basing point pricing system (Federal Trade Commission v. Cement Institute, 333 U.S. 683); retail price maintenance (Federal Trade Commission v. Beech-Nut Packing Company, 257 U.S. 441); price fixing (Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U.S. 52).

ods of competition" in place of the words "unfair competition" because the meaning which the common law had given to the latter words was deemed "too narrow." The Court further said (p. 312) that Congress advisedly adopted a phrase which does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion." See also Foderal Trade Commission v. Raladam Co., 283 U.S. 643, 648. In Federal Trade Commission v. Bupte Bros., 312 U.S. 349, 353, the Court said that Congress intended Section 5 of the Trade Commission Act to be a "flexible concept with evolving content."

The Commission's power to proscribe these exclusive dealing contracts is further supported by reference to the Sherman and the Clayton Acts. Conduct violative of either of these statutes is within the scope of the prohibitions of Section 5 of the Federal Trade Commission Act. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 690-692; Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 466. And exclusive dealing agreements have been repeatedly held unlawful under the Sherman Act, and the Clayton Act.

<sup>Sherman Act: International Salt Co. v. United States,
332 U.S. 392, 396; Vitagraph, Inc. v. Perelman, 95 F. 2d 142
(C.A. 3), certiorari denied 305 U.S. 610; United States v.
Great Lakes Towing Co., 208 Fed. 733 (N.D. Ohio), appeal</sup>

Moreover, trade practices which are not actual violations of the Sherman and Clayton Acts, but which contravene the "public policy declared" in those Acts, constitute practices which Section 5 of the Federal Trade Commission Act authorizes the Commission to prohibit. Fashion Originators' Guild v. Federal Trade Commission, supra, at p. 463. Section 3 of the Clayton Act reflects a strong public policy against exclusive dealing arrange-That section flatly prohibits such agreements by sellers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. Standard Oil Co. of California v. United States, 337 U.S. 293; Richfield Oil Corp. v. United States, No. 395, this Term, decided April 21, 1952. Although the contracts in the instant case are presumably not within Sections. 3 since the exclusive commitment is by the seller of screen space (the theatre) rather than by the buyer (MPA), the effect on competition is the same in either situation. The basic public policy against exclusive dealing arrangements which adversely affect competition; as declared by Section 3 of the

dismissed, 245 U.S. 675; United States v. Eastman Kodak Co., 226 Fed. 62 (W.D. N.Y.), appeal dismissed, 255 U.S. 578; United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa.), affirmed, 330 U.S. 806. Clayton Act: Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346; Butterick Co. v. Federal Trade Commission, 4 F. 2d 910 (C.A. 2), certiorari denied, 267 U.S. 602; Standard Oil Company of Calif. v. United States, 337 U.S. 293; Richfield Oil Corp. v. United States, Oct. T. 1951, No. 395; Carter Carburetor Corp. v. Federal Trade Commission, 112 F. 2d 722 (C.A. 8).

Clayton Act, brings MPA's exclusive contracts within the authority to prohibit unfair methods of competition conferred upon the Commission by Section 5 of the Federal Trade Commission Act.

We submit that the foregoing authorities clearly sustain the Commission's power to prohibit exclusive dealing contracts of the kind here involved. The decision below, that the Commission transcended its statutory authority in prohibiting such contracts, is in conflict with numerous decisions of this Court holding that the words, "unfair methods of competition" embrace practices having the basic characteristics of the practice here involved.10 The decision below also conflicts with the decision of the Court of Appeals for the Third Circuit in Hershey Chocolate Corporation v. Federal Trade Commission, 121 F. 2d 968, which sustained a Commission order prohibiting exclusive dealing contracts as an unfair method of competition." The contrary holding in the present case will, if it is allowed to stand, seriously impede the Commission's enforcement of the Act.

2. It is not clear what the court below meant by its statement (R. 151) that the "proof has failed to establish" that MPA's methods of competition are "unfair." If the court meant that what is "un-

10 See cases cited in note 8, supra, p. 11.

¹¹ The contracts that the Commission prohibited in that case were between Hershey, a manufacturer of chocolate bars, and the three largest operators of chocolate bar vénding machines. Under the contracts Hershey agreed to sell chocolate bars exclusively to those operators:

fair" within the meaning of the statute is a question of fact requiring adequate evidentiary support, we submit that the court erred in its conclusion as to the issue presented in determining what is an "unfair" method of competition. This is the ultimate issue which the Commission is required to determine on the basis of all relevant facts shown by the evidence and found by the Commission. It is a question of law (Federal Trade Commission v. Gratz, 253 U.S. 421, 427), for determination by the Commission in the first instance, but subject to judicial review with respect to legal error in its determination.

If the court below meant that a practice which is claimed to be a business necessity cannot be an unfair method of competition notwithstanding its adverse effect upon competition or its tendency to monopoly, we submit that this interpretation of the statute is plainly incorrect. Virtually every unfair method of competition involving restriction of competition is sought to be defended on the ground of business necessity or convenience. The weight, if any, to be accorded such defense is a question peculiarly calling for the Commission's expertise; it is not one to be determined independently by a reviewing court by application of its own standards.

Furthermore the court's conclusion that exclusive contracts for more than a year's duration are necessary to the operation of this type of business

constitutes an erroneous invasion of the Commis-'sion's fact-finding functions. 'The court's apparent finding as to business necessity necessarily involved rejection of the Commission's conclusion that exclusive screening contracts running for more than one year are not "necessary to the performance of its [MPA's] contracts with advertisers" (R. 115). This conclusion has the support of the testimony of MPA's own district sales manager, that over 50% of its exclusive contracts are for only one year and that exclusive agreements for such period are "sufficient" under existing conditions (Comm. App. 99). The court's apparent finding also flies in the face of MPA's admission, made in its motion for modification of the Commission's order, that the prohibitions of the order. insofar as they apply to future exclusive screening contracts of more than a year's duration, can be complied with "without great financial loss or burden" (R. 133).

3. The court below held, as an apparently independent ground for its decision, that the exclusive dealing agreement involved in the instant case is a "contract of agency" governed by Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568. In the Curtis case, this Court held that agreements by circulation agents to handle and supervise the distribution of Curtis publications exclusively were not, under the circumstances there existing, violative of Section 3 of the Clayton Act

or Section 5 of the Federal Trade Commission Act. In the instant case, however, the relationship between MPA and the exhibitor was not that of principal and agent, but that of buyer and seller of screen space. None of the usual indicia of agency is here present. The exhibitor does not in any respect act as a representative or agent of MPA. The latter had no power to control the exhibitor; it could not "enter the theatre and operate the [projection] machine or display the advertisements" (R. 151). The screening agreements do not make the exhibitor the agent of MPA any more than an independent retailer is the agent of the manufacturers whose products he handles.

We submit that treating MPA's exclusive dealing arrangements as agency contracts, and thus exempt from the Federal Trade Commission Act, is a perversion of the facts and a gross misapplication of the Curtis decision. It would create a wide loophole in the Act and seriously impede effective enforcement. Under such a holding, there would be virtually no buyer-seller relationship which could not be viewed as exempt from the Act on agency principles. During the present Term this Court rejected a similar attempt to insulate from Section 3 of the Clayton Act, on agency principles, exclusive dealing contracts between an oil company and its service station operators. Richfield Oil Corp. v. United States, supra.

4. Since the Commission could have proscribed

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respondent's exclusive dealing agreements in toto, certainly it could select the lesser remedy of restricting their duration. The determination of "what remedy is necessary to eliminate the unfair * * * trade practices which have been disclosed" is within the "wide latitude" of the Commission's expert discretion. Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 612-613. Judicial review of the exercise of that discretion "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy" (id. 612). The courts will not interfere "except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (id. 613). In the instant case the court below departed from that salutary rule when it substituted its own judgment for that of the Commission as to business needs or convenience which would, in the case of exclusive dealing agreements of more than a year's duration, remove them from the category of unfair methods of competition.

CONCLUSION

The decision below conflicts with decisions of this Court and with that of another circuit, and it presents an important question of federal law which this Court has not specifically decided. It is respectfully submitted that the petition for certiorari should be granted.

> PHILIP B. PERLMAN, Solicitor General.

MAY 1952.

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No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1952

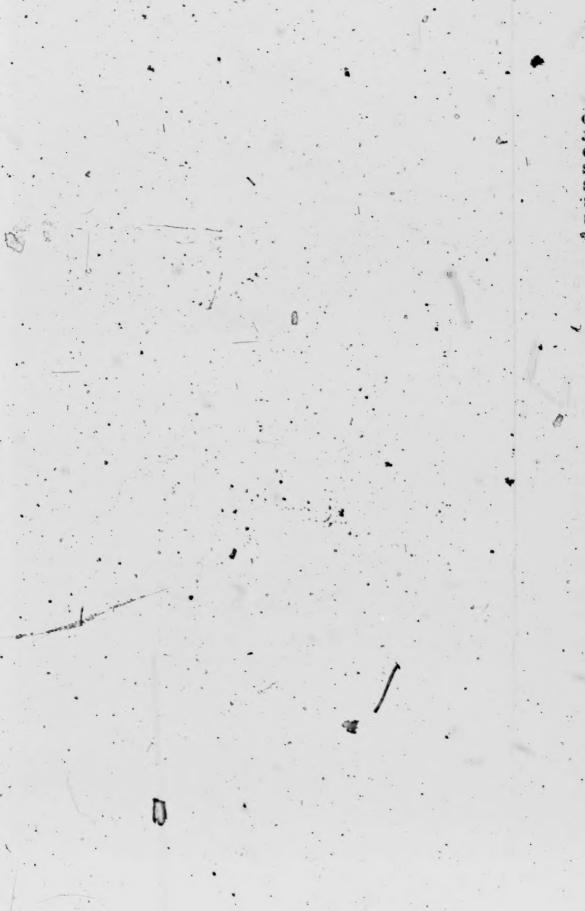
FEDERAL TRADE COMMISSION, PETITIONER

v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT-

BRIEF FOR THE PEDERAL TRADE COMMISSION



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No. 75

FEDERAL TRADE COMMISSION, PETITIONER

v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT.
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 81) is reported at 194 F. 2d 633.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1952 (R. 86). The petition for a writ of certiorari was filed on May 20, 1952, and was granted on October 13,

(1)

We shall use the designation "R," in referring to the first volume of the record. References to the second and third volumes of the record will be designated, respectively, "R. vol. II" and "R, vol. III".

1952 (R. 89). The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondent is a producer and distributor of advertising motion picture films, and in the course of its business it has entered into many long-term contracts with motion picture exhibitors which give respondent the exclusive right to exhibit advertising films in the theatre or theatres covered by such contracts. The Federal Trade Commission found that these exclusive rights, when they run for a period of more than one year, unduly hinder and lessen competition and have an inherent tendency to monopoly. On review of the Commission's order-directed against respondent's use of such contracts, the questions presented are:

- 1. Whether respondent's use of contracts which give it the exclusive right to exhibit advertising films for a period of more than one year constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.
- 2. Whether the Commission could validly determine that such contracts violate Section 5, when it had determined that contracts giving such exclusive exhibition rights for a period not greater than one year do not violate Section 5.
- 3. Whether such contracts made the exhibitors respondent's agents in the furnishing of exhibi-

tion service, and thus rendered the exclusivedealing agreements permissible under Section 5.

4. Whether a prior order of the Commission issued against respondent is res judicata of the issues in the Commission's proceeding against respondent which is now under review.

STATUTE INVOLVED

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 717, 719, 52 Stat. 111, 15 U.S. C. 45, provides in part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The present proceeding was initiated by a complaint issued by the Federal Trade Commission in May 1947 charging respondent with the use of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (R. 7-9). After hearings before an Examiner of the Commission, he filed a recommended decision which included a recommended order that respondent cease and desist from entering into contract with exhibitors which grant exclusive rights

to display advertising films for a period greater than one year (R. 38, 53). The parties waived exceptions to the Examiner's recommended decision and order, as well as the filing of briefs and oral argument before the Commission (R. 56). On October 17, 1950, the Commission filed its findings of fact, conclusion and order (R. 56-64).

Similar complaints had been filed against three other companies, Alexander Film Company, United Film Ad Service, Inc., and Reid H. Ray Film Industries, Inc., Comparable findings and conclusions and like orders were entered in each of the other three cases. See In the Matter of Reid H. Ray Film Industries, 47 F. T. C. 326; In the Matter of Alexander Film Co., 47 F. T. C. 345; In the Matter of United Film Aid Service, Inc., 47 F. T. C. 362. The Commission filed a single opinion in the four cases (R. 64), and Commissioner Mason filed a dissenting opinion (R. 67).

We shall set forth the Commission's findings herein in some detail. Respondent, as we understand it, does not dispute the Commission's findings, except those relating to the effect upon competition of its exclusive-dealing contracts.

² All four companies filed petitions to review the Commission's orders, but two, Alexander and Ray, have dismissed their review proceedings and the orders against them have become final by operation of Section 5 (g) of the Federal Trade Commission Act, 15 U. S. C. 45 (g). United's petition is pending in the Eighth Circuit, but, by stipulation of the parties entered prior to judgment in the instant case, the judgment herein will also be determinative of United's case.

Respondent has been engaged since 1925 in the business of arranging for the showing of advertising films in motion picture theatres. This business involves making contracts with advertisers for the display, in designated theatres, of films which advertise the products or business of the advertiser; producing or procuring films suitable for this purpose; and making contracts with theatre owners and operators (referred to as exhibitors) under which respondent pays the exhibitor for the privilege of having the advertising films supplied by respondent appear on the screen of the exhibitor's theatre or theatres. (R. 57.)

Space available for the showing of advertising films is limited. Only about 60% of the country's motion picture theatres accept film advertising. In addition, the theatres which do accept such films limit their number because theatre patrons resent the showing of too much film advertising. Accordingly, the number of commercial films permitted to be shown varies from three to six, and their display consumes from 2% to 4% of the total screen time at each show. (R. 60.)

Respondent serves the needs of, and provides for, three general types of film advertising. (1)

The advertising films used by respondent are only about 60 feet in length, and are known as playlets. They may be in color or in black and white, with live action or animated cartoons and with sound accompaniment. (R. 58.)

In the case of local advertisers, respondent uses films which advertise a particular kind of business, and attaches a trailer identifying the local advertiser with such business. Playlets of this kind, known as library film, can be repeatedly different localities and avoid prohibitive cost of making a special film for each local advertiser. (2) In the case of manufacturer-dealer programs, employed when a manufacturer's product is distributed through a limited number of dealers, specific playlets are produced and their cost is usually borne by the manufacturer. Dealers who participate in the advertising program pay all or part of the charge for showing the films in theatres and are identified by trailers attached to the playlets. (3) Socalled national advertising occurs when playlets are made to advertise a company's product which is sold through numerous outlets, and in this advertising the manufacturer bears the cost of making the playlets and the charge for showing the film. (R. 58.)

Respondent's contracts with advertisers provide for display of films weekly or bi-weekly, usually for a period of one year, with a different playlet for each week of the showing. Contracts for a one-year period are the standard practice, and respondent will not accept a contract from an advertiser which provides for advertising for a period of less than 13 weeks. (R. 59.)

Respondent's contracts with exhibitors are for various periods up to a maximum of five years, and the majority are for a one-year or two-year term (R. 58). About 25% are for the maximum five-year period (R. 58-59). Of 4,096 theatres with which respondent had screening agreements as of August 1, 1947, 2,493, or more than 60%, had an exclusive clause barring the exhibitor from displaying any advertising film not furnished by respondent (R. 60). The three other respondents before the Commission enter into like exclusive contracts. Alexander Film Company had exclusive contracts with 4,913 theatres, United Film Ad Service, Inc., with 1,562 theatres, and Reid H. Ray Film Industries, Inc., with 458 theatres (ibid.). Thus, these companies, plus respondent, had exclusive contracts with 9,426 theatres or approximately 75% of the 12,676 theatres in the United States which display advertising films (R. 59-60).

Respondent is in substantial competition with other companies engaged in the business of distributing advertising films (R. 58). Respondent's exclusive contracts bar competitors from the screens of the theatres covered by these contracts and limit the outlets of its competitors in a field which in Itself is limited (R. 60). This has had the effect of forcing some competitors to go out of business (ibid.). The injurious effects upon competition of respondent's exclusive contracts, and their inherent tendency to monopoly.

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have been materially increased by the exclusory effect of the like agreements made by the three other principal companies in the business (R. 60-61).

In many instances theatres prefer exclusive agreements because they give better control of screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers (R. 61.) Such agreements also permit negotiation of more satisfactory contracts with advertisers because the agreements assure use of the screens of particular theatres during the term of the advertiser's contract (ibid.).

When a distributor's contract with an exhibitor expires before completing the screen showing called for by the distributor's contracts with advertisers, the exhibitor customarily permits the screening to continue so as to complete the contracts with advertisers. In practice, the period of time covered by a distributor's contract with an exhibitor means the period of time in which the distributor may solicit contracts with advertisers rather than the period of time in which advertising films supplied by the distributor will be shown on the screens of the exhibitor's theatres. (R. 59.)

The Commission concluded that respondent's use of exclusive screening agreements which run for a period of more than one year constitutes "an unreasonable restraint and restriction of

competition," and that prohibition of such contracts is required in the public interest (R. 63). It concluded that the fact that such agreements may aid the respondent in building up its business is not controlling where, as in the circumstances under consideration, the agreements have the effect of unduly hindering, lessening and injuring competition (R. 62). The Commission also concluded that since advertising contracts for a period of one year have become "standard practice in the trade," since the definite availability of future screen space facilitates the securing of advertising contracts, and since film advertising space in theatres is limited, exclusive screening agreements for periods not in excess of one year are not an undue restraint upon competition (ibid.).

The Commission's order directs respondent to cease and desist from (1) entering into any contracts giving it the exclusive privilege of exhibiting advertising films for more than one year, or (2) continuing in effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends more than one year beyond the date of service of the Commission's order (R. 63-64).

^{&#}x27;The Commission subsequently denied respondent's motion (R. 71) to modify the cease and desist order by eliminating the prohibition on continuation of exclusive-dealing agreements whose unexpired term extended for more than one year (R. 77-79).

The court of appeals, in setting aside the Commission's order, held that the proof failed to establish that respondent's exclusive-dealing agreements were "unfair" methods of competition or that their prohibition would be "in the public interest" (R. 85). The court further held that the Federal Trade Commission Act did not enlarge or change "the definition of unfair methods of competition as laid down by the courts prior to its enactment" (iiid.). It stated (R. 85-86):

Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such that prospective screen advertisers require an assured outlet "for a reasonable time," respondent's

⁵ The court indicated that it was of the opinion that increasing the amount of screen advertising is not in the public interest, but the court stated that it was not dismissing the proceeding upon this ground (R. 85).

of exclusive contracts for periods longer than one year "was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management" (R. 86).

The court also appears to have rested its decision upon the further ground that the contract between respondent and the exhibitor is a "contract of agency" covered by the decision of this Court in Federal Trade Commission vo Curtis Publishing Co., 260 U. S. 568 (R. 85).

SPECIFICATION OF ERRORS. TO BE URGED

The court of appeals erred:

- (1) In holding that the Commission had erred in determining that respondent's use of exclusive screening contracts extending beyond the period of one, year constitutes an unfair method of competition.
- (2) In substituting its own judgment for that of the Commission as to whether respondent's practices are "unfair" methods of competition.
- (3) In holding that a practice is not an unfair method of competition if it is "rendered desirable and necessary by good-business acumen and ordinarily prudent management."

The court did not pass upon respondent's contention that a prior Commission proceeding was res judicata of the instant case (R. 82). This contention was presented to, and rejected by, the Commission in a separate opinion issued early in the coceedings (R. 14-16).

- (4) In holding that the contract between respondent and the exhibitor is a "contract of agency" governed by the holding in Federal Trade Commission v. Curtis Publishing Co., 260 U. S. at 643.
 - (5) In holding that the common-law concept of unfair competition fixes the scope of the prohibition of "unfair methods of competition" in the Federal Trade Commission Act.
 - (6) In setting aside the Commission's cease and desist order and dismissing its complaint.

SUMMARY OF ARGUMENT

I

It is well settled that the authority given the Federal Trade Commission by Section 5 of the Act to suppress "unfair methods of competition" empowers the Commission to prohibit "all conduct violative of the Shermare Act" and also many practices which "do not assume the proportions of Sherman Act violations." Federal Trade Commission v. Cement Institute, Inc., 333 U. S. 683, 694. Congress vested in the Commission "adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages" (id. p. 693). Moreover, the Commission's power is not limited to practices which were regarded as unfair competition at common law. Federal

Trade Commission v. Keppel & Bro., 291 U. S. 304, 310-311.

Here the Commission has found that respondent's long-term exclusive dealing contracts unreasonably restrain competition and tend to monopoly. That finding is supported by a showing that respondent, in the 27 states in which it operates, has exclusive contracts with almost 40% of the theatres exhibiting advertising films, and that the four major companies, against all of whom the Commission entered cease and desist orders, together had exclusive contracts with 75% of all available cutlets throughout the United States. In view of the highly limited number of opportunities for displaying advertising films it is obvious that such a situation enables the established companies "collectively, even though not collusively, to prevent a late arrival from wresting more than an insignificant portion of the market." Standard Oil Co. v. United States, 337 U. S. 293, 309.

Exclusive dealing agreements have repeatedly been held unlawful under both the Sherman Act and the Clayton Act. Whether or not these agreements are prohibited by either of those acts it was clearly competent for the Commission to conclude that their effect in the situation here disclosed was unreasonably to restrain competition and to tend to monopoly and that they should, therefore, be prohibited as unfair methods of competition.

The fact that the Commission did not prohibit all exclusive dealing contracts is no argument against the validity of the more limited order which it did enter. It is unnecessary to consider whether the Commission might have prohibited all of respondent's exclusive dealing contracts as illegal per se under the Sherman Act. If such contracts are illegal per se then the Commission's order prohibiting certain exclusive contracts is clearly valid. If, on the other hand, illegality turns on the circumstances there was reasonable basis for the line which the Commission drew between contracts which exclude competitors for a year and those which exclude competitors for a longer period.

III

The exclusive dealing agreements were not exempt from Section 5 of the Federal Trade Commission Act as contracts of agency. Those agreements have none of the attributes of an agency; the theatre owner, like other owners of advertising media, is simply selling space to an advertiser. But in any event nothing in Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, on which the court below relied, or in any other decision of this Court warrants a suggestion that business practices which happen to be cast in the form of agency are thereby immunized from the

power of the Commission under Section 5 to suppress unfair methods of competition.

IV

Respondent's contention, not passed on by the court below, that a prior Commission proceeding is res judicata of the issues herein is plainly without merit. The prior proceeding was based on a conspiracy; moreover it covered a different period of time. Compare Federal Trade Commission v. Raladam Co., 316 U.S. 149, 152.

ARGUMENT

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RESPONDENT'S CONTRACTS WITH EXHIBITORS GIVING EXCLUSIVE RIGHTS FOR PERIODS GREATER THAN ONE YEAR CONSTITUTE UNFAIR METHODS OF COMPETITION WHICH THE FEDERAL TRADE COMMISSION IS AUTHORIZED TO PROHIBIT

It is settled that the "unfair methods of competition" which Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission to suppress include "violations of the Sherman Act," and that the Commission has jurisdiction to prohibit as an unfair method of competition any conduct which violates the Sherman Act. Federal Trade Commission v. Cement Institute, Inc., 333 U. S. 683, 690-692, and cases cited. Moreover, the Trade Commission Act, while it embraces "all conduct violative of the Sherman Act," covers also many practices which "do not assume the proportions of Sherman Act

Congress in enacting the statute to vest in the Commission and the courts "adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." Id., p. 693. If a practice "runs counter to the public policy declared in the Sherman and Clayton Acts," it comes within the authority given to the Commission of Section 5 of the Trade Commission Act. Fashion Originators' Guild, Inc. v. Federal Trade Commission, 312 U. S. 457, 463.

In a variety of situations, this Court has sustained the power of the Commission to prohibit as unfair methods of competition practices which tend to eliminate competitors, monopolize trade, or restrict opportunity to deal in a free market. Practices of this kind which have been held to constitute "unfair methods of competition" include boycott of competitors (Fashion Originators Guild v. Federal Trade Commission, 312 U. S. 457), use of a multiple basing point pricing system (Federal Trade Commission v. Cement Institute, 333 U. S. 683), retail price maintenance (Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441), and price fixing (Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U.S. 52).

It is well settled, moreover, that the Act is not confined, as the court below thought, to what

the courts had, prior to its enactment, defined as unfair methods of competition (R. 85). In Federal Trade Commission v. Keppel & Bro., 291 U. S. 304, 310-312, this Court carefully reviewed the Act's legislative history, and held that Congress adopted the "broader and more flexible" phase "unfair methods of competition" in place of the words "unfair competition" because the meaning which the common law had given to the latter words was deemed "too narrow." In that case, this Court also emphasized the weight to which the Commission's expert judgment, based upon adequate and properly supported findings, is entitled (291 U. S. at 314).

The Commission's finding that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly is thus the necessary starting point in considering the validity of the Commission's order. If there is support in the evidence for this finding, and if, under this finding, respondent's practices violated the Sherman Act, or, at the least, came "within the inhibition of the policies declared by the Sherman

In that case the Court said (p. 312) that Congress advisedly adopted a phrase which does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" Subsequently the Court said that Congress intended Section 5 of the Trade Commission Act to be a "flexible concept with evolving content." Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 353.

Act" (Fashion Originators' Guild case, supra, at p. 465), the Commission acted well within the ambit of its authority when it determined that respondent's long-term exclusive contracts con, stitute unfair methods of competition.

We submit that certain central, undisputed facts provide ample support for the Commission's finding as to restraint of trade and tendency to monopoly. Respondent is a distributor of advertising films and the number of outlets for such films, whether distributed by respondent or its competitors, is severely limited. This, therefore, is not a situation in which the availability to competing manufacturers of a potentially unlimited number of other dealers may lead to the conclusion that the manufacturer's exclusive dealing practices do not violate the Sherman Act.

In the 27 states and the District of Columbia in which respondent distributes advertising films, only 6,260 theatres exhibit such films and respondent has exclusive contracts with 2,493 of these theatres, or 39.5% (R. 59-60). Necessarily, in particular states a much higher percentage of the available theatres is engrossed by these contracts, just as in other states the percentage engrossed is much below that of the whole area in which respondent is marketing film advertis-

^{*} See United States v. J. J. Case Co., 101 F. Supp. 856 (D. Minn.).

ing. In fact, the evidence before the Commission showed that in three states respondent's exclusive contracts bound 70% to 74.5% of the available theatres whereas in two states such contracts bound less than 5% of the available theatres, and the Commission might properly appraise the restrictive effects of respondent's exclusive contracts upon the basis of the areas in which the potentialities for restraint and monoply had been most fully realized. United States v. Yellow Cab Co., 332 U. S. 218, 226; Standard Oil Co. v. United States, 337 U. S. 293, note 5 at pp. 299–300.

Moreover, the evidence indicates that the theatres with which exclusive agreements were made were usually the most desirable ones. As respondent's president testified, "Roughly, 75 percent of the volume of business that we do is on screens that will not screen ads for other people" (R. Vol. II, 95). And he further stated that respondent always sought "to secure exclusive agreements

^{*} Exhibit 1, as admitted in evidence in the Commission proceeding, shows the following:

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New Ha Tennesse Massach Arizona New Me	ee iuset	ts		 			51 248 170 61 79)	38 · 183 · 119 · 1 · 3		74. 8 73. 8 70 1. 6 3. 1

with theatres that might be termed highly salable to advertisers" while in the case of less salable theatres "we would take an exclusive agreement if they offered it to us" (R. Vol. II, 90; see also id. 83).

The Commission found that the effect of respondent's exclusive contracts in limiting the outlets for advertising films was increased by the like exclusive contracts made by the three other. principal companies in the business (R. 60-61). The four major concerns, together, foreclosed to other companies 75% of all, available outlets throughout the United States (R. 60), and, as indicated above, undoubtedly the foreclosure of the more desirable available outlets ran considerably higher. When, as here, the four dominant concerns in the industry pursue the same restrictive practices, the limitations on competition which result are compounded. In Standard Oil Co. v. United States, 337 U.S. 293, 309, this Court observed that, since all the major suppliers had been using requirement contracts, it would not be far fetched to infer that the effect has been to enable the established suppliers "collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."

Because of the uniformity in the practices of the four dominant concerns, the Commission proceeded against, and entered like cease and desist orders against, each of the four (*supra*; p. 4), recognizing that only thus could relief against the resulting restraints on competition be achieved.

Respondent's exclusive contracts suppress, during their life, all opportunity to compete for the patronage of the contracting theatres. In many areas these contracts close against competition well over a majority of all available outlets. In addition, many of the remaining outlets are closed to competition because of the exclusive contracts made by the three other major companies in the husiness. These undisputed facts fully support the Commission's finding of restraint on competition and tendency to monopoly, and the statute makes conclusive findings of the Commission which are "supported by evidence" (15 U. S. C. 45 (c)).

U. S. 392, the district court had entered summary judgment against the defendant both under Section 1 of the Sherman Act and Section 3 of the Clayton Act. It was established by pleadings or admissions that the defendant had entered into many leases of two patented machines relating to utilization of salt in industrial processes, and that the leases required the lessees to purchase from the defendant all salt consumed in the leased machines. This was a restraint of trade for which defendant's patents afforded no immunity from the antitrust laws, but the defendant contended that summary judgment was

fact as to whether the restraint imposed by the tying provision was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly within the Clayton Act. This Court held, however, that the tendency of the agreements to accomplishment of monopoly was "obvious", and that the admitted facts "left no genuine issue." 332 U. S. at 396. A fortion, in the present case where the question is whether there is evidentiary support for an administrative finding, the findings as to restraint on competition and tendency to monopoly plainly withstand challenge. See also Féderal Trade Commission v. Morton Salt Co., 334 U. S. 37, 50.

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The restraint on competition and tendency to monopoly which result from respondent's long-term exclusive contracts bring its conduct within the prohibitions of the Sherman Act. Agreements which limit the outlets through which a product may be sold in interstate commerce "have been condemned time and again as violative of the [Sherman] Act." United States v. Yellow Cab Co., 332 U. S. 218, 226. See also Associated Press, Inc. v. United States, 326 U. S. 1, 18-19 and cases cited. Exclusive dealing agreements have been repeatedly held unlawful both under the Sherman Act and under the Clayton Act."

¹⁰ Sherman Act: International Salt Co. v. United States, 332 U. S. 392, 396; Vitagraph, Inc. v. Perelman, 95 F. 2d 142 (C. A. 3), certiorari denied, 305 U. S. 610; United States v.

The court below appears to have ignored the necessary effect of respondent's exclusive dealing contracts in restricting access of competitors to outlets for advertising films, and thereby restraining competition and tending to monopoly. In doing so it appears to have substituted its judgment for that of the Commission, and to have given conclusive weight to its view that respondent's practices were "rendered desirable and necessary by good-business acumen and ordinarily prudent management." (R. 86). As it said, "no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition" in violation of the Act (ibid).

To the extent that this conclusion rests upon a rejection, substantially without discussion, of

Great Lakes Towing Co., 208 Fed. 733 (N.,D. Ohio), appealdismissed, 245 U. S. 675; United States v. Eastman Kodak Co., 226 Fed. 62 (W. D. N. Y.), appeal dismissed, 255 U. S. 578; United States v. Pullman Co., 50 F. Supp. 123 (E. D. Pa.), affirmed, 330 U. S. 806; United States v. Standard Co., 78 F. Supp. 850 (S. D. Calif.), affirmed on other points, 337 U. S. 293; United States v. American Can Co., 87 F. Supp. 18, 31-32 (N. D. Calif.).

Clayton Act: Standard Vil.Co. v. United States, 337 U.S. 293: Richfield Oil Corp. v. United States, 343 U.S. 922; Standard Fashion, Co. v. Magrane-Mouston Co., 258 U.S. 346; Eutterick Co. v. Federal Trade Commission, 4 E. 2d 910 (C.A. 2), certiorari denied, 267 V.S. 602; Carter Carbureter Corp. v. Federal Trade Commission, 112 F. 2d 722 (C:A. 8).

¹¹ The court spoke of a presumption that respondent's business was "without substantial monopolistic tendency", which it said "is not rebutted by the evidence" (R. 85–86).

the Commission's findings as to the effect on competition, it cannot be sustained for reasons already indicated. To the extent that it reflects a view that practices which restrain competition must nevertheless be permitted if rendered desirable by good business acumen it is likewise untenable. Conduct which is within the ban of the Sherman Act and the policies of that Act, and which the Commission may therefore prohibit as an unfair method of competition, is not given sanction by reason of the fact that it may be "beneficial" to respondent in building up its business or by reason of the fact that many theatres "prefer" exclusive agreements. Fashion Originators' Guild, Inc., v. Federal Trade Commission, 312 U. S. 457, 467-468. In that case, which involved a Commission order directed against the use of unfair methods of competition, this Court held that since the practices which the Commission had prohibited fell within the prohibitions of the Sherman and Clayton Acts, they would be given no sanction by a showing that they "benefited" the manufacturers engaging in the practices, their employees, the retailers to whom they sold, and consumers, by protecting each group against the "devastating evils" incident to the pirating of original designs for ladies' garments.

The absence of a finding by the Commission that respondent specifically intended to restrain or monopolize trade is likewise immaterial. A

finding of specific intent to restrain trade or to build a monopoly is not essential to a finding of violation of the antitrust laws. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. * * * Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 334 U. S. 100, 105.

Up to the present point, we have referred to violation of the Sherman Act and contravention of the policies which that Act expresses as providing full basis for the Commission's determination that respondent's long-term exclusive-dealing contracts were unfair methods of competition within the meaning of the Trade Commission Act. Aside from this, Section 3 of the Clayton Act reflects a strong public policy against exclusive, . dealing arrangements. That section flatly prohibits such agreements by buyers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. Standard Oil Co. v. United States, 337 U. S. 293; Richfield Oil Corp. v. United States, 343 U.S. 922. Although the contracts in the instant case are presumably not within Section 3 since the exclusive commitment is by the seller of screen space (the theatre) rather than by the buyer (respondent), the effect on competition is

the same in either situation. The basic public policy against exclusive-dealing arrangements which adversely affect competition, as declared by Section 3 of the Clayton Act, brings respondent's exclusive contracts within the Commission's authority to prohibit unfair methods of competition.

H.

THE COMMISSION'S PROHIBITION OF CONTRACTS GIVING
EXCLUSIVE SCREENING RIGHTS FOR A PERIOD
LONGER THAN ONE YEAR IS NOT INVALIDATED BY
ITS FAILURE TO BAN ONE-YEAR EXCLUSIVE CONTRACTS

The court below seems to have been of the opinion that, because the Commission did not rule that respondent's exclusive screening contracts are per se illegal and because it concluded that the one-year exclusive contracts made by respondent did not violate the Federal Trade Commission Act, its order against exclusive contracts of a longer term must fall (R. 83).

It is not necessary in this case to pass upon the question of whether exclusive-dealing contracts applicable to an important segment of interstate commerce are per se illegal under the Sherman Act. See International Salt Co. v. United States, 332 U. S. 392, 396. But see United States v.

This case, as stated previously, involved exclusive requirements contracts incorporated in leases licensing the use of patented machinery.

Columbia Steel Co., 334 U. S. 495, 522-523. The fact that in the present case the Commission's determination and order are not premised upon the view that exclusive screening contracts are per se illegal is certainly not a ground for vitiating its determination and order. The Commission's application of a test of illegality less drastic than the doctrine of illegality per se gives respondent no ground for complaint.

The Commission, upon a balancing of the traderestraining effects of respondent's exclusive
screening contracts against the business considerations advanced in justification of such contracts, concluded that in the case of one-year contracts the latter considerations sufficiently outweighed the former so as not to call for prohibitory action by the Commission, but reached
the opposite conclusion as to longer term contracts. We submit that this conclusion is not
vulnerable on the basis of either logic or the
proof.

If respondent's exclusive contracts with exhibitors are to be deemed per se illegal under the Sherman Act, the Commission's order must stands. If their illegality under that Act is appropriately determined by a balancing of all relevant considerations, there necessarily must be a drawing of the line and, under the facts, there is ample justification for viewing the duration of the contracts as fixing the dividing line between conduct

which is permissible and that which is not permissible under the Federal Trade Commission Act.

Contracts with advertisers customarily provide for film advertising to appear for a period of a year, and the advertiser desires assurance that his advertising will appear for this period in the theatres designated in the contract. One-year exclusive screening contracts provide this assurance, but there is no need in this connection for exclusive screening contracts of a longer term. While the date on which respondent enters into a screening contract may not coincide with the dates on which it enters into contracts with advertisers calling for a year of film advertising, the Commission's order, as interpreted in its opinion (R. 67), permits respondent to incorporate in any. one-year exclusive screening contract a provision authorizing it to complete advertising contracts which had been entered into during the life of the screening contract. During such completion, any balance of screening space on the theatres covered by respondent's contract would be available for film advertising supplied by whoever then had a contract for exclusive screening rights or, if no such contract was made, would be available to any and all comers.

The Commission's conclusion that exclusive screening contracts running for more than one year are not "necessary to the performance of its [respondent's] contracts with advertisers" (R. 62) has the support of the testimony of respond-

ent's district sales manager, that over 50% of its exclusive contracts are for only one year and that exclusive agreements for such period are "sufficient" under existing conditions (R. Vol. III, 99). The court's apparent finding also flies in the face of respondent's admission, made in its motion for modification of the Commission's order, that respondent could comply with the prohibitions of the order against future exclusive screening contracts of more than a year's duration "without great financial loss or burden" (R. 73). Furthermore, two of the other three principal companies in the business, one of which \(Alexander Film Co.) had much the largest number of exclusive screening contracts (R. 60), have permitted orders, imposing the same prohibitions as the order entered against respondent, to become final (supra, note 2, p. 4).

III

THE EXCLUSIVE DEALING AGREEMENTS WERE NOT EX-EMPT FROM THE FEDERAL TRACE COMMISSION ACT AS "AGENCY" AGREEMENTS

Apparently as an alternative basis of decision, the Court of Appeals held that the screening contracts with movie theatres were contracts of agency and that for that reason its decision was "governed" by Federal Trade Commission v. Curtis Publishing Co., 260. U. S. 568, which required that the Commission's order be set aside. We submit that neither the court's premise nor

its conclusion is valid; these contracts are not contracts of agency, and even if they were, that fact would not preclude the Commission from acting as it did.

The situation involved in the Curtis case was almost the exact opposite of that here presented. There the Commission and this Court had before them an arrangement by which a publishing company had employed "agents" for the purpose, inter alia, of training, instructing and supervising a staff of school boys in accordance with the publishing company's plan and subject to its direction and control. The agent was to supply school boys and other dealers with magazines with which the company supplied the agent, all on a consignment basis. No contention was made that this was not a genuine agency; the contention was simply that as to those agents who had formerly been independent dealers the effect of the plan was to curtail competition (260 U.S. at 581), and that as to such agents the plan violated Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Here, on the other hand, there is no suggestion that any of the parties to the screening agreements regarded them as creating a relationship of agency.¹³ On the contrary, the theatre owners

¹⁸ Respondent's standard agreements (which were in evidence before the Commission, Commission Exhibits 21 and 22) nowhere use language of agency. Some of its agreements (Comm. Exs. 27-W and 27-Z-1) use language inconsistent with agency.

regarded themselves as renting out space, just as they had formerly done when advertisements were lettered on a drop curtain that was lowered between performances (R. Vol. II, 77-78). As one theatre owner stated " I am like the man with a bill-board, I have so much space to sell and I want so much money for it" (R. Vol. II, 221; see also, id. 184). Similarly, respondent and other distributors of advertising films considered, not that they were hiring exhibitors to perform a service for them, but that they were paying the exhibitors for "the privilege of running screen advertising on his screen" (B Vol. II, 71; see id. 83).4 There is nothing in the record to suggest that respondent sought to instruct, control or supervise the exhibitor in the way in which he displayed film, other than to require that it be displayed at a time when the theatre was dark and the audience seated. On the other hand, the record is full of evidence that exhibitors were concerned to control the number and quality of the films shown, both because of a sense of responsibility to their audience and because it was typically to the exhibitor that the merchant addressed any

For a number of years the Interstate Circuit, in Texas had its own advertising department. As the head of that department testified, "instand of renewing the contract [with the Alexander Film Cd.] * * * we decided * * to do our own selling and take all the profits that would otherwise have gone to a film advertising company" (R. Vol. II, 187).

complaint with respect to the advertising shown, as, for example, in the case of contemporaneous advertising of two concerns engaged in the same kind of business. See e. g. R. Vol. II, 125, 129, 140, 161, 223, 238-239.

Thus the relationship has none of the ordinary attributes of agency. The exhibitor does not act subject to respondent's control (Restatement of Agency, Secs. 1, 14); the shoe is on the other foot. The exhibitor has no occasion or power to bind respondent to a contract or subject him to tort liability (id., Sec. 12). And the exhibitor certainly does not act as a fiduciary (id., Sec. 13). The court below seems to have rested its conclusion that the relationship was one of agency on the fact that the exhibitor rendered a personal service; he projected the film. But obviously the exhibitor is not being paid for projecting film, any more than an advertiser pays a newspaper for the service of setting his ad in type, or a billboard company for the service of keeping the board properly lighted. To suggest that such incidental performance of service results in making the exhibitor the agent of the distributor of film advertising is, indeed, to suggest that the tail wags the dog.

¹⁵ The suggestion that the relationship is a fiduciary one is most clearly exposed in the case of a non-exclusive contract, where the exhibitor may refuse to show advertising films of X because his theatre is filled that week with films of X's competitor Y.

But even if it could be assumed that the relationship was one of agency that would not help respondent. In the Curtis case the Court referred to the fact of agency as disposing of charges under Section 3 of the Clayton Act, prohibiting exclusive dealing in a lease of a sale or contract for sale (260 U.S. at 581). Its opinion contains no suggestion that the mere fact that agency is , involved takes a practice outside the scope of Section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition." Subsequent decisions have emphasized that in considering the application of the Sherman Act "the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade" (United States v. Masonite Corporation, 316 U.S. 265, 280). Like considerations must apply under Section 5 of the Federal Trade Commission Act. That section contains no exemption for agency contracts; it authorizes the prohibition of unfair methods of competition no matter what the legal form in which those unfair methods may be cast. If, as we have shown earlier in Point I, the Commission could properly find that because of their practical economic effect on competition the longterm exclusive contracts which it has prohibited are an unfair method of competition, its power to prohibit them under Section 5 of the Federal

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Trade Commission Act is not restricted by the fact that the court below, rightly or wrongly, described them as contracts of agency.

IV

THE ORDER WHICH THE COMMISSION ISSUED IN 1943 AGAINST RESPONDENT AND OTHERS IS NOT RES JUDI-CATA OF THE ISSUES IN THE PRESENT PROCEEDING

The court below did not pass upon respondent's contention that a prior order of the Commission issued against respondent and others was res judicata of the issues in the instant proceeding, but the question is solely one of law, is clearly without merit, and should now be disposed of so that a proceeding which has been pending more than five years may be brought to final termination. Compare Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211, 214; Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469, 473-474.

In March 1942 the Commission issued a complaint charging that respondent and other named companies engaged in the distribution of advertising films had entered into "understandings, agreements, combinations, and conspiracies" among themselves to suppress competition in the distribution of such films, in violation of Section 5 of the Federal Trade Commission Act. In the Matter of Screen Broadcast Corporation, et al., 36 F. T. C. 957, 962. One of the charges made was that "pursuant to" said understandings, etc., the respondent distributors had entered into long-

privilege of displaying advertising films in the exhibitors' theatres (id., 962-963). After a hearing, the Commission in June 1943 made findings sustaining these charges, concluded that the practices set forth in its findings constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and entered a cease and desist order against continuing or carrying out "any planned common course of action, agreement, understanding, combination, or conspiracy" to do certain specified things, including the making of contracts with exhibitors for the exclusive privilege of exhibiting advertising films in the exhibitors' theatres (id. 970, 973, 974).

The issue in the instant case is whether respondent's long-term exclusive screening contracts violate the Trade Commission Act irrespective of agreement or conspiracy with others to engage in this practice. This is an issue wholly outside the charges made and determined in the 1942 proceeding. Since the claim in the present action was not determined in the earlier action the determination there made is not res judicata of the issue presented in the later proceeding. And there equally is no basis for estoppel by judgment since recovery in the second action does

¹⁶ The nature of the issue is, of course, not altered by reason of the simultaneous institution by the Commission of like proceedings against other companies in the business.

not depend upon a question "the same as" one previously litigated and determined. Tait v. Western Maryland Ry. Co., 289 U. S. 620, 623; Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 50; Cromwell v. County of Sac, 94 U. S. 351, 353. The Commission was, therefore, clearly right when it said in its opinion on the plea of res judicata (R. 15–16):

In the first proceeding the gravamen of the offense charged was the combination and conspiracy to do and the doing of certain acts pursuant to such combination and conspiracy. The acts charged as a violation of law in the present proceeding are the individual acts of respondent not charged as having been done pursuant to any agreement or understanding with others. The difference between the issues in the two proceedings is therefore apparent.

March 1942 and the second a period up to May 1947. Where the determination of a claim, such as use of unfair methods of competition, depends upon the conclusion to be drawn from numerous relevant facts which easily may vary from one period to another, determination of the legal effect of one set of facts is not an adjudication of the legal effect of similar but nevertheless different facts existing in another period. In such a situation, which likewise involved Section 5 of the Trade Commission Act, this Court sum-

marily rejected as "without merit" the contention that the earlier proceeding was res judicata of the later. Federal Trade Commission v. Raladam Co., 316 U. S. 149, 152. See also Engineer's Club of Phila. v. United States, 42 F. Supp. 182, 187-188 (Ct. Cls.); Dayder v. Commissioner, 73 F. 2d 5, 6 (C. A. 3), affirmed on other points, 295 U. S. 134.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, with directions to enter a judgment affirming and enforcing the order of the Commission.

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NOVEMBER 1952.

Office - Supreme Court, U. \$. FILED

JUN 2 3 1952

IN THE

CHARLES ELMORE CROPLEY

Supreme Court of the United States OCTOBER TERM, 1951

No. 25 75

FEDERAL TRADE COMMISSION,

Petitioner.

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

On Petition of Solicitor General for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States OCTOBER TERM, 1951

No. 786

FEDERAL TRADE COMMISSION,

Petitioner.

Dersus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

On Petition of Solicitor General for a Writ of Certiorari to the United States Burt of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 147-152) is reported at 194 F. (2d) 633.

JURISDICTION

The jurisdictional requisites are set forth in the petition of the Solicitor General.

QUESTION PRESENTED

The case presented by the above petition is this: Whether the Federal Trade Commission can restrain a motion picture advertising company from entering into a contract with a motion picture theatre exhibitor which gives the advertising company the exclusive right to exhibit advertising films on the screen of the theatre for a period of five years.

The Federal Trade Commission (by a majority vote) held that such an exclusive right was permissible for one year, but not for five years. The Court of Appeals for the Fifth Circuit unanimously set aside the order of the Commission, holding that an exclusive right for five years is valid.

The sole issue presented in this matter is whether such an exclusive theatre screening agreement for a term of five years constitutes an unfair method of competition in commerce within the intent and meaning of Section 5 of the Bederal Trade Commission Act (15 U.S.C. Sec. 45) and, as such, whether the prevention of such method is in the interest of the public in that it (a) unduly restrains competition; or (b) has created, or tends to create, in respondent, a monopoly.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 45.

STATEMENT OF THE CASE

There is no charge in the complaint of any combination or conspiracy. The sole charge is that respondent has been, individually, guilty of an unfair method of competition.

The record establishes without dispute (1) that the time and space for the exhibition of motion picture ad-

vertising films on theatre screens is severely limited to from three to six ads, or an over-all of two to four minutes of the time consumed by each show; (2) that from the very beginning of the industry, more than thirty years ago, all motion picture advertising companies alike (hereinafter referred to as distributors) have solicited and obtained exclusive theatre screening agreements for a duration up to five years; (3) that there is, and always have been, free, open, active and substantial competition among all distributors in the securing of theatre screening agreements; and (4) that one-year contracts are not practical for the following reasons: (a) Theatre screens are not fully available until fourteen or fifteen months after the inception of the contract, due to the fact that films of the predecessor distributor are generally played out to completion by the theatre; (b) It takes many months after selling advertising to produce a film and start the screening of it in the theatre; (c) Considerable sums are spent by the distributor in traveling and other expenses of salesmen in order to secure screening privileges, and these expenses are not justified if the screening agreement is limited to one year; (d) A distributor could not afford to pay minimum guarantees demanded by theatres if the term is limited to one year: (e) A distributor could not afford to spend hundreds of thousands of dollars each year to keep current "library films" unless it could be assured of screen space for more than one year in which to exhibit the films; (f) No one would invest capital in the business of the distributor without assurance of a market for more than one year; and (g) Finally, theatre owners themselves frequently demand guarantees for more than one year, or otherwise refuse to exhibit motion picture advertising.

ARGUMENT

Taking into consideration all of these facts, we respectfully submit that exclusive theatre screening agreements for a term of five years are not unreasonably long, do not unduly suppress competition, and do not have a tendency to create in respondent a monopoly. They surely do not constitute an unfair trade practice. Such contracts have been entered into by all distributors, both large and small, from the very inception of the industry more than thirty years ago. The practice of obtaining exclusive contracts is not some new scheme adopted by respondent to stifle competition. All of the testimony shows that theatres frequently change distributors from time to time. The Government's own witnesses testified that the motion picture advertising business could not be operated without exclusive theatre screening agreements, and further stated that such agreements were advantageous, not only to the distributor, but also to the theatre owner, the advertiser and the public. The record fails to establish that any of respondent's competitors were forced out of business because of exclusive theatre screening agreements. few who took the stand for the Commission admitted that they lost out in competition because of the inferior quality and character of the films furnished by their producers, the lack of such films during the war years, their own lack of sales organization, and in some cases, their failure to pay the theatres in accordance with their contracts.

As the Solicitor General's petition says (pages 8 and 9 thereof):

"The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such that prospective advertisers require an assured outlet 'for a reasonable time', M.P.A.'s use of exclusive contracts for periods longer than one year 'was not unfair or unreasonable, but was rendered desirable and pecessary by good-business acumen and ordinarily prudent management (R. 152)."

As a matter of fact, as the Court of Appeals in its decision found, the record shows:

"The available space for screening advertisements is limited, as only about 60 per cent of the theatres accept film advertising; in addition, theatre patrons resent the showing of too much of this character of advertising, and thus impose economic barriers on the amount that may be run. The time consumed that will be tolerated by the public is said to be from three to six minutes, or from two to four per cent of the time consumed by the show."

The Court of Appeals said further:

"The Commission concluded that an exclusive screening agreement for a period of one year was not an undue restraint on competition, but that such agreement for a longer period should be prohibited. The record shows that there is free and open competition among the distributors to secure such agreements, and that, from the beginning of the industry, distributors have sought and obtained exclusive screening agreements. The Commission having determined that exclusive agreements are not unfair or illegal per se but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person would invest sufficient capital in the business without assurance of exclusive screening space for a longer period than one year; and that theatres themselves frequently demand guaranties for a longer period, or otherwise refuse to exhibit motion picture advertisements."

And the Court concluded by saying:

"Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence; then no means that are just, truthful, reasonable, and requisite to the successful operation of the business are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

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"Therefore, with available space and time for advertisements on the screen for motion-picture exhibitors severely limited, with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioner's method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. (citing numerous authorities)"

The dissenting Federal Trade Commissioner's reasoning, quoted by the Court, is to the same effect.

THE LAW

In Federal Trade Commission v. Gratz, 253 U.S. 421, 427, the Court said:

"The words 'unfair method of competition' are not defined by the statute and their exact

meaning is in dispute. It is for the courts, not for the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals * or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." (Emphasis supplied.)

The complaint contains no intimation that respondent did not properly obtain exclusive theatre screening agreements. So far as appears, acting independently of their competitiors, respondent undertook to negotiate these contracts with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition.

In Federal Trade Commission v. Raladam Company, 283 U.S. 643, 646, 647, the Court said:

"By the plain words of the Act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisities: (1) that the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appear to be in the interest of the public."

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

In applying the principles of the Raladam case to the case at bar, the Court of Appeals for the Fifth Circuit said:

"The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites to the power of the Commission to issue its order in this case to tease and desist. Cf. Federal Trade Commission v. Raladam Company, 283 U.S. 643, 646, 648."

In Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 361, the Chief Justice used the following language:

"The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.

"It is therefore necessary in this instance to

consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

Mr. Justice Brandeis said in Board of Trade v. United States, 246 U.S. 231, 238, 239:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. history of he restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

The general rule and its exception are well stated

in Binderup v. Pathe Exchange, 263 U.S. 291, 312, in which the Court said:

"It is doubtless true that each of the distributtors, acting separately, could have refused to furnish films to the exhibitors without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor." (Emphasis supplied)

In Federal Trade Commission v. Paramount Famous-Lasky Corporation, et al., 57 F. 2d 152, the Circuit Court for the Second Circuit said at page 157:

> "The respondent is not required, under the law, to so conduct its business that every competitor may conduct his with an equal degree of success according to his size and importance. It was not the purpose of the act to equalize opportunity or insure an equal degree of success upon the part of all competitors in a given industry, but it was its purpose to preserve, for the benefit of the public, active competition therein, and where there is no question of monopoly involved, the question is whether the method of competition described has a dangerous tendency unduly to hinder competition. Fed. Trade Comm. v. Gratz, supra. As the Supreme Court put it in Fed. Trade Comm. v. Curtis Pub. Co., supra, Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.'

"In the instant case, there is no finding that the respondent combined with other large pro-

ducers for the purpose of hindering those outside the large combination, and the widence would not warrant such a finding. In the absence of combination or agreement, the fact that the method of negotiation as practiced by the respondent tends to exclude other independent producers is of itself insufficient to establish any probable tendency toward the creation of the evils prohibited by the Sherman Anti-Trust Act (15 USCA § 1 et seq.). Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of competitors. Fed. Trade Comm. v. Standard Oil Co., 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746." (Emphasis supplied)

In the case of United States v. Western Union Telegraph Company, et al., 53 Fed. Supp., 377, a proceeding in equity was instituted by the United States against Western Union Telegraph Company and certain of its officers to enjoin the enforcement of certain exclusive contracts that had been entered into with various railroad, transportation and terminal companies, hotels, public buildings and sports arenas. The agreements were lease arrangements whereby Western Union, as lessee, was granted the exclusive right of occupancy, the lessors covenanting that during the term of the agreements no space in the premises would be leased to competing telegraph companies. The petition charged (a) a conspiracy among the defendants to restrain trade in commerce; (b)) that the enforcement of the contracts was in restraint of trade in commerce; and (c) that the defendants had attempted to monopolize interstate trade in commerce in telegraph communication.

The District Court for the Southern District of New York, in an opinion by Nevin, D.J., at page 381, stated the question for determination as follows:

> "The Government's case stands or falls on the question whether the contracts, singly or in the aggregate, constitute a violation of the Sherman Act. Section 3 of the Clayton Act, 15 U.S. C.A., § 14, prohibiting certain restrictions in connection with the sale or lease of tangible property, the source of so many of the decisions on which the Government usually relies in anti-trust cases, does not apply and is not invoked. The Federal Trade Commission Act, 15 U.S.C.A. § 41, et seq., does not apply to telegraph companies and is not invoked. The question arises under the Sherman Act alone, and the issues are these: (1) Whether the contracts are unlawful restraints of trade under Section 1. (2) Whether, if not, defendants can be held to have unlawfully monopolized or attempted to monopolize commerce under Section 2 by means of a series of such contracts any of which separately would concededly be lawful."

The Court held that the Eherman Act had not been violated and ordered the petition dismissed, and, in so holding made, among others, the following Conclusions of Law at page 392:

"3. The defendant company and its officers, the individual defendants, have not engaged in a conspiracy to restrain trade and commerce in telegraph communication and to monopolize such commerce by making exclusive contracts with railroad, transportation and terminal companies, the owners of hotels, public buildings and sports arenas, for the purpose of excluding competing telegraph companies from such premises and therefore have not violated Sections 1 and 2 of the Sherman Anti-Trust Act.

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- "4. The exclusive contracts entered into by the defendant company and railroad, transportation and terminal companies, the owners of hotels, public buildings and sport arenas, while gaining for the defendant company a competitive advantage, do not constitute an unreasonable restraint of interstate trade and commerce in telegraph communication in violation of Section 1 of the Sherman Anti-Trust Act.
- "5. The exclusive contracts with railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas entered into by defendant through its officers and agents, do not form a part of a nationwide plan to exclude competing telegraph companies from such locations, but rather are of the usual incidents attendant to a vigorous prosecution of the business of the defendant, and the defendant company and its officers and agents have not attempted by means of such contracts to monopolize interstate trade and commerce in telegraph communication in violation of Section 2 of the Sherman Anti-Trust Act.
- "6. The exclusive provisions of the contracts between the defendant and the railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas are lawful and valid and not in violation of the terms of Section 1 and 2 of the Sherman Anti-Trust Act."

In the case of Goldberg v. Tri-States Theatre Corp., 126 F. 2d (CCA 8th, 1942), two theatre buildings in Omaha, Nebraska, were owned by the same party. The buildings were the State Theatre building and the World Theatre building. The assignee of Tri-States Theatre Corp. had entered into a sublease covering the World Theatre building, which sublease agreement contained a covenant that the owner would not use or per-

mit the use of the State Theatre building as a motion picture theatre. The State Theatre building was thereafter used as a motion picture theatre in violation of this restrictive covenant and a suit was filed to enjoin such use.

The Court, in an opinion by Johnson, Circuit Judge, in upholding the validity of such a restrictive covenant, and in granting the injunction, at page 29 said:

"The validity of the agreement, as a restraint upon trade, is not seriously open to question under the general contract law of Nebraska. An agreement which places a restriction upon the use of certain real estate is not invalid in Nebraska, as being an unreasonable restraint of trade, where the restriction is purely ancillary to the acquiring of an interest in another piece of real estate for commercial purposes; where it places only a limited restraint as to period and manner of the use of such property; where it does not appear to be greater than reasonably to serve as a protection in accomplishing the legitimate commercial purpose for which the interest in the other real estate involved was acquired; and where it does not have as its primary object or as its direct result the fostering of some illegal monopoly."

The Court of Appeals for the Fifth Circuit, in reversing the Commission in the case at bar also held, and we submit correctly, that the contract between respondent and the theatre is one of agency, citing Federal Trade Commission v. Curtis Publishing Company, 260 U.S. 568. In that case the Court upheld an exclusive agreement between Curtis Publishing Company and its distributors requiring the distributors to distribute the periodicals of Surtis Publishing Company to the exclusion of the periodicals of all other competitors during the term of the contract, and, at pages 581 and 582 said:

'The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has longbeen recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords me ground for condemnation under the statute." (Emphasis supplied)

That case presents an exact parallel with the case at bar. There, Curtis Publishing Company entered into agreements with news dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, respondent enters into agreements with theatres whereunder the theatres are appointed as exclusive agents of respondent to display the advertising films of respondent, subject to the condition that the theatres will not during

the life of the contract, display the advertising films of competitors.

We submit that the principle announced in the Curtis case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive, does not constitute an unfair method of competition, and affords no ground for condemnation under the statute.

In State For Use of Independence County v. Tad Screen Advertising Co., 133 S.W. 2d 1, it was held that the advertising distributor did a local business in the state in which the theatre was located, on the ground that the theatre was merely the agent of the advertising distributor to exhibit the film.

We, therefore, submit that the Court of Appeals was correct when it said:

"In another aspect, we have here a contract of agency, and our decision is governed by Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely granted the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement;

and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period."

CONCLUSION

For the reasons above stated, we respectfully submit that the individual soliciting and obtaining by respondent of exclusive theatre screening agreements from theatre exhibitors for a period of five years do not constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, and that the prevention of such contracts is not in the interest of the public because (a) they do not unduly restrain competition, and (b) have not created, or tended to create, in respondent, a monopoly.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of this Court, or with decisions of any other circuit.

The Court of Appeals for the Fifth Circuit found that respondent's methods of conducting its business were open, honest, without monopolistic tendency, and that the exclusive theatre screening agreements for a term of five years were requisite to the successful operation of the business and, accordingly, not an unfair method of competition in commerce.

We submit that the decision of the Court of Appeals reversing the order of the Commission and dis-

missing the complaint is correct, and that, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, the undersigned, do hereby certify that I have this day served copies of the above and foregoing brief for respondent in opposition to the petition for a writ of certiorari, on the Solicitor General of the United States, by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, June

, 1950

Charles Rosen

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IN THE

MAROLD B. VELLEY, Clark

Supreme Court of the United States october Term, 1952

No. 75

FEDERAL TRADE COMMISSION,

Petitioner,

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF MOTION PICTURE ADVER-TISING SERVICE COMPANY, INC.

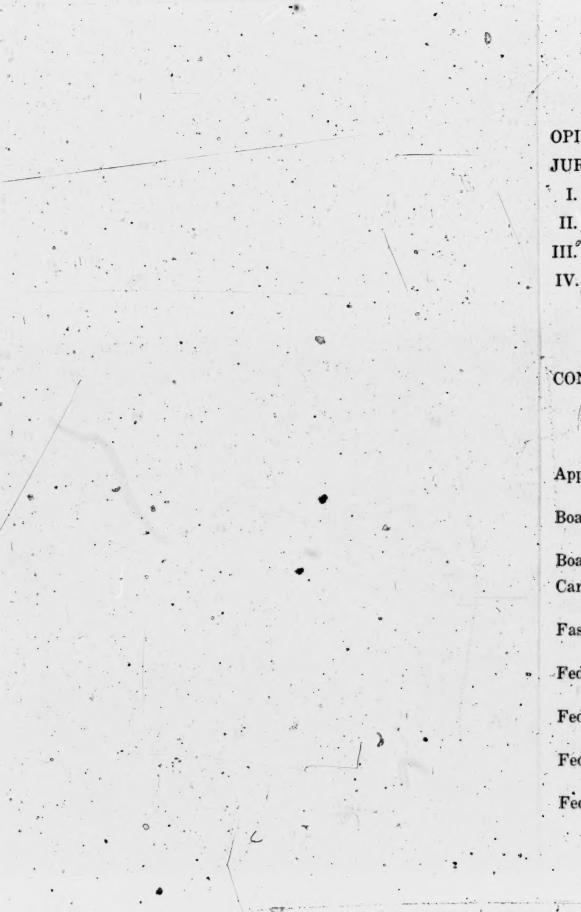
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF MOTION PICTURE ADVER-TISING SERVICE COMPANY, INC.

A writ of certiorari was issued to review the judgment of the United States/Court of Appeals for the Fifth Circuit entered in this cause on February 21, 1952.

OPINION BELOW

The opinion of the Court of Appeals (R. 81) is reported at 194 F. 2d 633.

We shall use the designation "R." in referring to the first volume of the record. References to the second and third volumes of the record will be designated, respectively, "R. vol. II" and "R. vol. II".

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

I.

STATEMENT OF THE CASE

This is a proceeding under Section 5 (a) of the Federal Trade Commission Act 38 Stat. 717, 719; 52 Stat. 111; 15 U.S.C. 45, wherein the Commission issued its complaint on May 26, 1947 against Motion Picture Advertising Service Company, Inc. (hereinafter referred to as "M.P.A."), which, in substance, charges M.P.A. with engaging in unfair methods of competition in commerce by entering into exclusive screening agreements for periods of one to five years with various motion picture exhibitors, the tendency or effect of which is to unduly restrain competition in interstate commerce, and to monopolize the distribution of commercial or advertising films in such commerce. (R. 7-10)

Section 5 (a) of the Federal Trade Commission Act provides in part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in com-

merce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

M.P.A. answered the complaint alleging as a first defense that the sole issue presented is "res judicata" on the ground that the same issue between the same parties was presented and decided in favor of M.P.A. in

the matter entitled: "Screen Broadcast Corporation, et al." 36 F.T.C. 957-962; that after a full and complete hearing upon this issue, the Federal Trade Commission rendered a decision in which it refused to order M.P.A. (and the other respondents therein named) to cease and desist from entering into individual contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitor. Since the only issue involved in this present complaint has been fully and finally determined in M.P.A.'s favor in proceedings under the former complaint, said issue is "res judicata" and, accordingly, this complaint should be dismissed. (R. 10-11)

As a second defense in its answer, M.P.A. denied that its exclusive theatre screening agreements have a tendency or effect to unduly restrain, lessen, suppress and injure competition in the interstate sale, lease, rental and distribution of commercial and advertising films, or to monopolize the distribution of commercial or advertising films in such commerce, and specially denied that its acts or practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. (R. 11-13)

The plea of "res judicata" was overruled by the Commission and the case thereupon tried on its merits. (R. 14-16)

Testimony and other evidence were introduced by the Commission and M.P.A. before a Trial Examiner of the Commission, who rendered a recommended decision and order on May 31, 1949, the substance of which was that exclusive screening agreements for a limited period of

one year do not constitute an undue restraint upon competition, but that those in excess of one year would have a tendency to unduly restrain competition. (R. 38-55)

The Trial Examiner recommended that the Commission issue a cease and desist order prohibiting M.P.A. from entering into exclusive screening agreements with theatres for a term in excess of one year. (R. 55)

The Commission, with one dissent, rendered a decision on October 17, 1950, adopting in substance the findings of fact of the Trial Examiner and his recommended order. (R. 56-64)

The United States Court of Appeals for the Fifth Circuit on February 21, 1952 unanimously reversed the decision of the Commission, set aside the cease and desist order, and dismissed the complaint. (194 F. 2d 633)

At the same time that the Commission issued its complaint in this matter, it also issued three separate complaints against Ray-Bell Films, Inc., Alexander Film Company, and United Film Ad Service, Inc., three corporations engaged in the same business as M.P.A., charging them individually with the same alleged violations of Section 5 (a) of the Federal Trade Commission Act.

There is no charge of any combination or conspiracy among the four companies or between any of them to restrain trade, and it is conceded by the Commission that there is, and always has been, free, open, active and substantial competition among all distributors, in the securing of theatre screening agreements.

The cases were tried together under a stipulation that any evidence introduced by the respondent com-

panies should apply to all four of them and could be used by any one of them. The Commission introduced separate testimony against each of the four respondent companies, although in some instances where stipulated in the record, the testimony of certain particular witnesses was introduced against all four of the companies without the necessity of having the witness repeat his testimony.

II. THE FACTS

The material facts of the case are not disputed and are shown by (a) the testimony and exhibits; (b) the findings/of fact in the recommended decision of the Trial Examiner; (c) the findings of fact in the decision of the Federal Trade Commission; and (d) the opinion of the Court of Appeals. They are as follows:

- 1. M.P.A. is a corporation which was organized under the laws of the State of Louisiana in September, 1921, with its office and principal place of business in New Orleans, Louisiana.
- 2. From September, 1921 to June, 1925, M.P.A. acted as a distributor of advertising films. In June, 1925, M.P.A. organized its own studio and became a producer of films and, since that time, has been engaged in the business of producing, selling, leasing and distributing motion picture advertising films to, or on the order of, advertisers and other distributors of motion picture advertising films, and of furnishing display service by causing the exhibition of such films in theatres under screening agreements between M.P.A. and the theatre owners.
- 3. Before the advent of motion picture advertising, theatres exhibited advertising on "drop curtains" which

were lowered between performances or between acts. On these curtains were painted advertisements which produced a supplementary source of income to the theatres, the privilege of placing advertisements thereon being leased to some one sign company or painter. Advertising on theatre screens has developed from the original use of slides to black and white short films without life action or animation or sound, seasonal films, short life action films, reader type or tintype pictures, to present standard practice, which consists of the exhibition of 35 mm (millimeter) life action or cartoon animation (or a combination of both) in black and white, or color, with sound accompaniment.

- 4. There are in the United States at least 28 producers and distributors of 35 mm. film advertising playlets and at least 265 producers (who are not distributors) of 35 mm, film advertising playlets.
- 5. The motion picture advertising business is divided into three categories, namely, local advertising, manufacture-dealer or cooperative advertising, and national advertising.
- 6. Local advertising consists of the exhibition of films for local merchants in local theatres, and the films used for this purpose are known as "library films."
- 7. Manufacturer-dealer or cooperative advertising is national or regional in scope and consists of playlets produced in accordance with the manufacturer's specifications. The cost of production of the playlets, including the master film or negative, and the prints are borne by the manufacturer; and the cost of exhibiting the films is usually borne by the manufacturer or is shared by the manufacturer and his dealers, the manufacturer's dis-

tribtuors (middlemen between the manufacturer and his dealers) also sometimes sharing in distribution costs.

- 8. National advertising is national or regional in scope and consists of playlets produced in accordance with the manufacturer's specifications, the cost of production and exhibition of which are borne exclusively by the manufacturer.
- Library films for local advertising consist of a series of playlets advertising various lines of business. M.P.A. carries in its library a stock of films that advertise forty lines of business. These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business. Since these films are not specialized for any particular advertiser, they are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets. Library film is a playlet 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. The name trailer is 20 feet in length and the overall length of the film is 60 feet, the screening time of which is 40 seconds. Within the territory in which M.P.A. operates, its sales force regularly calls upon local advertising customers and offers to them its library film advertising service. M.P.A.'s contracts with local advertisers call for the display of particular library films on designated theatre screens under contract with M.P.A., usually on a weekly or alternate weekly basis for a period of one year but in no instance for less than thirteen weeks.
 - 10. Specially produced films for manufacturerdealer or cooperative advertising programs advertise

merchandise, products and service of a national manufacturer. They are playlets 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment; and to the playlet is added a 20-foot trailer depicting, among other things, the name of the dealer who is identified with the advertising message in his particular trade area. The overall length of the film is 60 feet and the screening time is 40 seconds. These specialized films and playlets may or may not be produced by M.P.A. Customarily, the manufacturer deals with one distributor in arranging for the initiation and execution of the advertising campaign, but not always. Usually, the distributor selected by the manufacturer is not alone able to provide the advertiser with the full coverage that he desires. Accordingly, the originating distributor who has the contract with the manufacturer enlists the aid of other distributors who have available theatre outlets. Through rate books, or other sources of information, the originating distributor knows of the theatres available throughout the territory to be blanketed by the advertising program, and of the theatre screening rates. and knows further that a fair average of such other theatres will be prepared to exhibit the playlets. When the originating distributor has in hand the required information respecting the coverage that he can assure and of the overall costs of exhibition, he reports to the manufacturer or advertising agency, receives approval, and proceeds to execute the program. The originating distributor's salesmen and the salesmen for the co-distributors sell the program to the advertise s dealers for use in the theatres where the respective distributors have screening rights, and in due course the program is launched in this widespread territory. The number of dealers may be as many as 5,000, and a substantial portion of the dollar volume of the motion picture advertising business is executed through these manufacturerdealer or cooperative programs.

- 11. Specially produced films for national advertising are playlets that advertise the merchandise, products and service of a national manufacturer that may be handled by numerous retailers in a given trade territory, and hence it is impracticable for the retailer to participate in the distribution costs. Usually, the playlets do not carry any dealers' name trailers. The playlets are 90 feet in length (minute movies), but may run to 120 or 130 feet, are in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. M.P.A. is a distributor of this type of advertising through the theatres which it has under contract, and the national advertiser or its advertising agency has available a list of theatres under contract with M.P.A. and a schedule of M.P.A.'s screening rates. Most of the advertising playlets are produced by concerns other than M.P.A.
 - 12. The film libraries represent substantial investments. The annual cost of library production of M.P.A. runs to more than \$300,000.00. The libraries are kept current to changes of style and these recurrent outlays run into substantial sums. The cost of manufacturer-dealer playlets for a year display runs to several thousand dollars.
 - M.P.A. and various theatres are divided into two general classes: non-exclusive contracts and exclusive contracts. Under a non-exclusive contract the screen is open to more than one distributor at the same time; whereas, under

an exclusive contract, only one distributor is permitted to show advertising on the theatre screen during the term of the contract (except that the theatre will generally run out to competition advertising contracts of other distributors which have been sold to the advertiser previous to the expiration of the exclusive contract). M.P.A. in common with other film advertising distributors has, from the very beginning of the industry, solicited and obtained exclusive theatre screening agreements for reasonable periods of time, the term ranging from one to a maximum of five years.

Under a non-exclusive screening agreement the theatre is paid by the distributor only for advertising films actually sold and exhibited, whereas, under an exclusive screening agreement the distributor may, and often does, pay the theatre a consideration (flat guarantee), irrespective of whether any advertising films are sold and exhibited, or pays a theatre in advance (advance guarantee) against rentals to be earned under the contract.

- 14. Motion picture advertising distributors must have a nucleus of exclusive screening agreements with theatres in order (a) to sell to local advertisers its library film service; (b) to sell manufacturer-dealer or cooperative programs; and (c) to sell national advertising programs.
- 15. M.P.A. must have a fairly representative number of assured theatre outlets to justify its large investments in libraries of films, in the large periodical outlays for keeping its library films current, and in the large costs represented by its productive and promotional organization. It must assure screening space for its customers and to that end must have a nucleus of theatre

outlets for service where and when required, time often being very much of the essence.

The business of a motion picture advertising distributor is the sale of an advertising service, which consists of a suitable advertising film, together with an acceptable place in which to display the film. A motion picture advertising distributor could not sell the film of an advertiser unless the distributor could assure the advertiser of the availability of the place in which the film would be displayed, any more than a bill poster company could sell an advertising poster without offering a billboard for the display of the poster. A film ad distributor could not afford to have any substantial investment in films unless he was assured of available theatre screening space for reasonable periods of time. Furthermore, since theatre screening space is severely limited, it is impractical for more than one distributor to exhibit films at the same time, and this is another compelling reason for the necessity of exclusive screening agreements.

- 16. Because of prohibitive costs it is not economically advantageous for a local merchant to have a special playlet made for his individual use.
- 17. A film ad distributor cannot run the risk inherent in a guaranty of minimum revenue to the theatre owner without securing a compensating right of availability of theatre screens.
- 18. Film advertising contracts should run for at least a year to produce the desired cumulative advertising impressions. A year's advertising contract has thus become standard practice. While actual exhibitions of an advertiser's program may be on a weekly basis, biweekly showings are common, although exhibitions every

third or fourth week are not uncommon. Advertising contracts limited to 13 weeks are becoming something of a rarity, a "teaspoon taste". And in order for the advertising campaign to be effective there is generally a follow-up campaign after the expiration of the first year's advertising contract, thus requiring the use of the theatre screen for more than one year.

- 19. Between the taking of an advertising contract, particularly a manufacturer-dealer or cooperative contract, and the beginning of the screening of the advertising, several months must elapse for the production and approval of the advertising film, the solicitation of dealers and the allocation and coordination of screen time.
- 20. It is standard practice to allow a distributor to continue to exhibit its advertising (which has been sold to the advertiser prior to the expiration of its theatre screening agreement) after the expiration of the old theatre contract, and thus its successor finds that only a fraction of the screen space for which it has contracted will be available for several months after the new contract term commences. A screen is not fully available until fourteen to fifteen months after the commencement of the contract. On a library service, it takes about sixty days to get the local advertiser's contract started. Moreover, many types of advertising, especially of national advertising (including manufacturer-dealer programs) are not screened until after the lapse of several months succeeding the making of the advertising agreements. In these cases, it takes six months to produce the special film and to contact dealers of the manufacturer.

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Advertising contracts are generally made for a

period of thirteen weeks to one year, and frequently advertisers enter into follow-up campaigns to commence at the end of the first year. Accordingly, unless the distributor has available screening space for a period of more than one year he would be in the anomalous position of being able to secure a contract from his advertiser for the first year, but being unable to accept a re-order for the follow-up advertising campaign.

- 21. M.P.A. has two general types of theatre screening contracts, shown in the record as Commission's Exhibits 21 and 22. The forms of contract contain the exclusive clause and contain the words "five years" as to the term of the contract; but in cases where the contract is non-exclusive, the exclusive clause is deleted, and in cases where the term is less than five years, the word "five" is stricken and the appropriate word is inserted in its place.
- 22. In January of 1925 M.P.A. had theatre screening agreements with 300 theatres in the States of Mississippi, Louisiana and a part of Alabama. In January of 1945 M.P.A. had theatre screening agreements with 3,000 theatres in twenty-eight states, and between January, 1945 and the Summer of 1948, M.P.A. obtained theatre screening agreements with an additional 1500 theatres, despite the vast amount of competition from competitors. During 1948 contracts with more than 3,000 theatres expired. An average of about one-third of the theatre screening agreements expire each year.
- 23. There were approximately 20,306 theatres in the United States on August 1, 1947, and about 12,676 exhibited film advertising. At that time M.P.A. had agreements with 4,096, of which 2,493 contained the exclusive clause. The terms of 1,387 of these agreements

run for less than five years and the terms of the other 1106 run for five years. No agreement runs longer than five years.

- 24. There is free, open, active and substantial competition among film advertising distributors for the securing of theatre screening agreements. Theatres frequently change distributors at the termination of contracts. There is also free, open, active and substantial competition in the acquisition of advertising contracts and in the production of advertising films.
- 25. M.P.A., in line with common practice, makes its creens available to competing film distributors; provided, however, that the screens shall not be loaded beyond the extent permitted by the theatres, that the films shall be of standard length, and that the quality of films shall meet the standards of the theatres. In such instances M.P.A. pays a standard American Association of Advertising Agencies' commission of 15% plus 2% cash discount.
- 26. Screening space is severely limited. Thus, out of some 20,306 motion picture theatres in the United States, about 40 per cent do not accept film ads. Motion picture shows commonly are limited to two per day, with a possible matinee on Sunday, and the shows run for two to two and a half hours. Theatre patrons, potential customers of the advertisers, who pay admission for entertainment, resent the showing of too much film advertising, and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes, or, from two per cent to four per cent of the time consumed by each show. In this respect motion picture advertising differs radically from news-

paper and magazine advertising, which is limited only by the availability of newsprint and normally occupies some 60 per cent of the overall newspaper or magazine space, and differs materially from radio advertising, which may allow 20 per cent of radio time for commercials.

- 27. Film advertising affords the theatre owner a desirable source of extra revenue, and furnishes advertisers a highly effective medium for the promotion and sale of their products and services.
- 28. Owners of many theatres insist upon limiting theatre screen advertising to one distributor at a time, and insist that the contract run for more than one year.
- 29. Many theatres enter into exclusive screening agreements with film advertising distributors for the following reasons:
 - (a) To afford better control of theatre screens as respects audience acceptance, and as respects confusion, chaos and revenue loss from a screen overload one week, and a screen underload the next week.
 - (b) To prevent misunderstandings with advertisers.
 - (c) To enhance screen rentals.
 - (d) To eliminate complicated bookkeeping procedure.
 - (e) To enable theatre owners to control film advertising through reliable distributors who will give efficient service and promptly pay their bills.
 - (f) To enable theatre owners to control the quality of the advertising films shown on their screens.

(g) To enable theatre owners to insist upon minimum guarantees.

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- 30. The quality of advertising films is a very important competitive factor in the film advertising business.
- 31. M.P.A.'s competitors who testified on behalf of the Commission have lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of their refusal to offer to pay as much as M.P.A. for theatre screen privileges, the inferior quality and character of their films, their lack of sales organization, and their failure to pay the theatres in accordance with their contracts.
- 32. All competitors of M.P.A. have entered into exclusive theatre screening agreements for terms of one to five years from the beginning of the industry, more than thirty years ago.
- 33. Many theatre owners would rather forego the supplementary source of income derived from screen advertising if required to exhibit films for more than one distributor at the same time, or, if required to limit the contract to one year.
 - 34. National advertisers and their advertising agents could not use the medium of screen advertising unless they were assured of space for periods of more than one year for the display of their special films manufactured at considerable cost to the manufacturer.
 - 35. No film advertising distributor has ever succeeded in business without exclusive theatre screening agreements.

The facts establish the following conclusions:

- 1. That M.P.A., in common with all other film advertising distributors, has, from the very beginning of the industry, more than thirty years ago, solicited and obtained exclusive theatre screening agreements for reasonable periods of time;
- 2. That the solicitation and acquisition of theatre screening agreements by M.P.A. have been in open and free competition with all competitors;
- 3. That unless the motion picture advertising business is to be outlawed in its essential functions, the acquisition of exclusive theatre screening agreements is necessary because
 - (a) Advertisers, whether they be local, national, or regional, must be definitely assured of screen space and time for the distribution and exhibition of their advertising films.
 - (b) Local advertising will disappear unless distributors can furnish syndicated service through the production of library film.
 - (c) Film advertising distributors cannot afford the large investments necessary to produce library film and for the renewals and upkeep thereof, and for the necessary organizational and promotional setups, unless they are assured of a market for their products through exclusive theatre screening agreements.
 - (d) Distributors cannot afford to yield to the importunities of theatre owners as respects minimum guaranteed revenue without a compensating assurance of exclusive screening rights.
 - (e) Non-exclusive theatres whose screens are open to all distributors tend to become chaotic in respect to the film advertising business, since

unlimited access to their screen results in too few or too many advertisements at each performance; in the display of competitive advertisements at the same performance, to the disaffection of advertisers, the annoyance of theatre patrons, and the chagrin of theatre owners; and in the general loss of control of the ousiness by the theatre owners, and of the revenue accruing therefrom.

- 4. That the terms of M.P.A.'s theatre screening agreements are not longer than business necessity dictates for the execution of effective advertising programs;
- 5. That M.P.A., acting independently of its competitors, has undertaken to negotiate theatre screening agreements with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition;
- 6. That exclusive theatre screening agreements for periods of one to five years do not unduly restrain, lessen, suppress, or injure competition;
- 7. That exclusive theatre screening agreements for periods of one to five years have not hindered or prevented competition in the selling, leasing and distributing of commercial or advertising films in commerce, and have not resulted in creating in M.P.A. a monopoly, and have not a dangerous tendency to create in M.P.A. a monopoly;
- 8. That the soliciting and obtaining of exclusive theatre screening agreements for periods of one to five years do not constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; and
- .9. That the prevention of the use of exclusive theatre screening agreements for periods of one to five years is not in the interest of the public.

III.

SUMMARY OF ARGUMENT

- 1. The words "unfair method of competition" are not defined by the Federal Trade Commission Act, and it is for the courts, not the Commission, ultimately to determine as a matter of law what they include. Each case must be determined on its own facts. And this rule is not avoided by the Commission's stating as a finding of fact what is a mere conclusion of law.
- 2. Exclusive theatre screening agreements for a duration of one to a maximum of five years, which are necessary in the operation of the business, which do not unduly suppress competition and which do not have a tendency to create in M.P.A. a monopoly, do not constitute unfair methods of competition in commerce and are not unlawful under Section 5 (a) of the Federal Trade Commission Act.
- 3. Theatre screening agreements are contracts of agency and are subject to the principle decided in the case of Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, in which this Court held that the appointment by the principal of exclusive agents does not constitute an unfair method of competition under Section 5 (a) of the Federal Trade Commission Act, and does not come within the bann of Section 3 of the Clayton Act.
- 4. The complaint of the Commission should be dismissed on the ground that the sole issue now raised has been adjudicated in favor of M.P.A. in a former complaint brought by the Commission in the matter of "Screen Broadcast Corporation, et al.", Docket No. 4736; 36 F.T.C. 957.

IV.

ARGUMENT

The Merits

The sole issue presented on the merits is whether the individual soliciting and obtaining by M.P.A. of exclusive theatre screening agreements from theatre exhibitors for periods ranging from one to a maximum of five years constitute an unfair method of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act, and, as such, whether the prevention of such method is in the interest of the public, in that it (a) unduly restrains competition; or (b) has created, or tends to create, in M.P.A. a monopoly.

There is no charge in the complaint of any combination or conspiracy. The sole charge is that M.P.A. has been guilty of an unfair method of competition.

The words "unfair method of competition" are not defined by the Federal Trade Commission Act, and it is for the courts, not the Commission, ultimately to determine as a matter of law what they include. Each case must be determined on its own facts, and this rule is not avoided by the Commission's stating as a finding of fact what is a mere conclusion of law.

In Federal Trade Commission v. Gratz, 253 U.S. 421, 427, this Court said:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not for 'e Commission, ultimately to determine as a matter of law what they include. They are clearly

as opposed to good morals or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade." (Emphasis supplied)

and at page 428 the Court said:

"If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

United States, 246 U.S. 231, 238, 239:

"Every agreement concerning trade," every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress er even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

In Northern Pigment Co., 71 Fed. 2d 574, the Court of Customs and Patent Appeals said:

"Each case of unfair competition must be determined upon its own facts owing to the multifarious means by which it is sought to effectuate such schemes. Federal Tr. Com. v. Beechnut Co., 257 U.S. 441, 453, 42 S. Ct. 150, 66 L. Ed. 307, 19 A.L.R. 882."

In Sugar Institute v. United States, 297 U.S. 563, 600, Chief Justice Hughes said:

"We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree."

And, in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 361, the Chief Justice used the following language:

"The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive prac-

tices and to promote competition upon a sound basis.

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.

"It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

In Federal Trade Commission v. Paramount Famous-Lasky Corporation, et al., 57 F. 2d 152, the Circuit Court for the Second-Circuit said at page 157:

"The respondent is not required, under the law, to so conduct its business that every competitor may conduct his with an equal degree of success according to his size and importance. It was not the purpose of the act to equalize opportunity or insure an equal degree of success upon the part of all competitors in a given industry, but it was its purpose to preserve, for the benefit of the public, active competition therein, and where there is no question of monopoly involved, the question is whether the method of competition described has a dangerous tendency unduly to hinder competition. Fed. Trade Comm. v. Gratz, supra. As the Supreme Court put it in Fed. Trade Comm. v. Curtis Pub. Co., supra,

'Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.'

"In the instant case, there is no finding that the respondent combined with other large producers for the purpose of hindering those outside the large combination, and the evidence would not warrant such a finding. In the absence of combination or agreement, the fact that the method of negotiation as practiced by the respondent tends to exclude other independent producers is of itself insufficient to establish any probable tendency toward the creation of the evils prohibited by the Sherman Anti-Trust Act (15 USCA § 1 et seq.). Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of competitors. Fed. Trade Comm. v. Standard Oil Co., 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746." (Emphasis supplied)

In National Biscuit Co. v. Federal Trade Commission, 299 F. 738, the Second Circuit Court of Appeals said:

"Whatever may be the exact meaning of the phrase 'unfair methods of competition', it is now settled that it is for the courts and not the Commission to determine as a matter of law what is and what is not included in the phrase. This ruling is not avoided by stating as a finding of fact what is a mere conclusion of law."

At page 739 the Court said:

"It was never intended by Congress that the

Trade Commission would have the duty and power to judge what is too fast a pace for merchants to proceed in business and to compel them to slow up. To do so would be to destroy all competition except that which is easy. Congress intended to eliminate all varieties of fraudulent practices from business in interstate commerce. Sinclair Refining Co. v. Federal Trade Com. (C.C.A.) 276 Fed. 686. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain; and to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs,' said the Supreme Court in Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 Sup. Ct. 450, 67 L. Ed. 746.

"Effective competition requires that merchants have freedom of action in conducting their own affairs. To be successful may increase or render insuperable the difficulties that rivals must face, but it does not constitute reprehensible or fraudulent methods. Federal Trade Commission v. Curtis Pub. Co., 260 U.S. 568, 43 Super Ct. 210, 67 L. Ed. 408. The method of competition. to be condemned as unfair, should be characterized by fraud, deception or oppression. Federal Trade Comm. v. Curtis, supra; Federal Trade Comm. v. Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993; N. J. Asbestos Co. v. Federal Trade Comm. (C.C.A.) 264 Fed. 511, 18 A.L.R. 546; Silver Co. v. Federal Trade Comm. (C.C.A.) 289 Fed. 985."

Whether exclusive contracts for a duration in excess of one year constitute an unfair method of competition is, therefore, a question of law to be determined by this Court, but in order to determine this issue, a scrutiny of the facts of the case should be made by the Court.

If the necessity for exclusive contracts from one to five years springs from business requirements and not from efforts to unduly restrain competition, then the contracts should be upheld as legal.

The Commission contended at the beginning of this case that all exclusive theatre screening agreements are illegal per se. After all the evidence was in, and it was clearly established that exclusive agreements are absolutely necessary in order to conduct a motion picture advertising business, both the Trial Examiner and the Commission held that exclusive agreements are not illegal per se since they do not constitute an unreasonable restraint of trade, provided the length of the agreement is not of too long duration. The cease and desist order rendered by the Commission upholds the legality of exclusive agreements, but limits their duration to one year. The Court of Appeals reversed the order of the Commission and dismissed the complaint, holding that the agreements should not be limited to a duration of one year, but should be permitted to run for periods of one to five years, as has always been the case since the inception of this industry more than thirty years ago.

Therefore, the only issue presently presented on the merits is whether exclusive agreements should be restricted to a period of one year, as decided by three of the four members of the Commission, or should be permitted to run for periods of one to five years, as decided by the dissenting member of the Commission and all three judges of the Court of Appeals.

All distributors alike from the very beginning of the industry, more than thirty years ago, have sought and obtained exclusive agreements for periods of one to five years. This method of doing business is not some new

scheme adopted by M.P.A. to stifle competition. It is abundantly established by the record that exclusive agreements for periods of one to five years are necessary for the operation of the business.

The record furthermore establishes that one-year contracts are not practical for the following reasons:

- (a) Theatre screens are not fully available until fourteen or fifteen months after the inception of the contract, due to the fact that films of the predecessor distributor are generally played out to completion by the theatre;
- (b) It takes many months after selling advertising to produce a film and start the screening of it in the theatre;
- (c) Considerable sums are spent by the distributor in traveling and other expenses of salesmen in order to secure screening privileges, and these expenses are not justified if the screening agreement is limited to one year;
- (d) A distributor could not afford to pay minimum guarantees demanded by theatres if the term is limited to one year;
- (e) A distributor could not afford to spend hundreds of thousands of dollars each year to keep current "library films" unless it could be assured of screen space for more than one year in which to exhibit the films;
- ness of the distributor without assurance of a market for more than one year; and
- (g) Finally, theatre owners themselves frequently demand guarantees for more than one year, or otherwise refuse to exhibit motion picture advertising.

Disregarding all the other points, except (a) above,

it is apparent that if the decision of the Court of Appeals is reversed and the cease and desist order of the Commission reinstated, M.P.A. and the other motion picture advertising distributors will. find themselves in this position:

A one-year exclusive contract with a theatre will be made and the theatre screen will not be fully available until 14 or 15 months after the inception of the contract, due to the fact that films of the predecessor distributor will be played out to completion by the theatre. At that time, the contract will be at an end, and the only right of the distributor will be to have the theatre play out to completion the advertising contracts which it has sold within the year. During the year of the contract, the screen will be partly filled up with advertising of the predecessor distributor, and during the succeeding year, it will be partly filled up with advertising of the successor distributor. Despite the fact that the distributor is required, in many cases, to pay in advance a guarantee for the exclusive use of the screen for the term of the contract, this right will never be enjoyed. It is essential to proper management that the limited use of the screen for advertising purposes be under the control of one distributor at a time. Salesmen of distributors who solicit advertising must know how many ads they are permitted to sell. They do know this where the screen is subject to exclusive use, but if the screen time is divided between two or more distributors, the salesmen will have to check with the theatre from day to day as to how many ads the theatre will run for their principal, and this will result in a chaotic condition, causing the resentment of the theatre owner, the advertiser and the public.

The Court may wonder why the Commission concluded to limit the exclusive agreements to a term of one year. The reason ascribed is because contracts with advertisers do not generally exceed one year. The Commission erroneously decided that business necessities do not require the screen privilege to go beyond the term of the advertising contract. It is obvious that the year in the two contracts is not co-terminus. If the contracts are limited to one year, M.P.A. at no time will enjoy the exclusive privilege for which it is generally required to pay a guarantee. M.P.A. could not afford to offer the same consideration for a one-year contract as it \ could for a longer one. The order of the Commission would thus destroy the value of the screen privilege which the theatre has to offer. Instead of accomplishing the desired purpose of increasing competition, the order of the Commission would have the opposite effect of suppressing competition. The only property right which the theatre has to offer is the use of its screen on which to exhibit advertising films. It is apparent that this right is worth very little, indeed, if it is not exclusive. The Commission concedes this by upholding one-year exclusive contracts.

In view of the business necessities above set forth for contracts extending beyond one year, distributors would not be willing to pay the guarantee demanded by the theatres for a screen privilege of such short duration. Thus, the very distributors whom the Commission desires to compete for the screen privilege would no longer have the same incentive to bid for the theatre screens which they now have. Therefore, the effect of reducing the term of the contract to one year would be to destroy competition instead of to encourage it.

The Commission states that M.P.A.'s exclusive con-

tracts have had the effect of forcing some of its competitors to go out of business. The record does not bear out this statement. The competitors of M.P.A. who testified on behalf of the Commission lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of the inferior quality and character of their films, the extreme shortage of film during the war years, their lack of sales organization, their failure to pay the theatres in accordance with their contracts and, particularly, their unwillingness to pay the theatres the amounts offered by other distributors. The only competitors of M.P.A. who testified for the Commission were: T. P. Grinspan, J. A. Pope, W. Bill Reichart, Rene P. Karrigan, Robert Wiegand and Nobles C. Campbell. As hereinafter shown, the testimony of all of these witnesses bears out our contention.

T. P. Grinspan testified that he was connected with Parrot Distributing Company; that that Company had been engaged in the business of producing film advertising, theatre trailers and industrial film for about 28 or 29 years; that his Company did not make screening agreements with theatres, but sold its film outright to advertisers or distributors who made their own screening agreements with theatres; that at one time the Company carried a line of library films but it was discontinued. (R. vol. II 3-4)

On cross-examination Mr. Grinspan testified:

"A. The volume declined greatly during the war.

There was an extreme shortage of film, and the business has been built up in 1946 and 1947." (R. vol. II 4)

On redirect examination he further testified:

- "Q. Now, was the dropping of your business caused by the lack of available films?
- "A. I am in no position to state definitely what caused the dropping off, so far as my personal knowledge is concerned." (R. vol. II 4)
- J. A. Pope testified that he was a distributor of advertising films purchased from the Parrot Distributing Company during the period from 1940 to 1945 in the territory of Arkansas, Oklahoma and southern Missouri, and that some theatres in that territory discontinued or refused to screen advertising for his customers on the ground that they had exclusive agreements with Alexander Film Company, or United Film Ad Service, Inc. He also stated that in 1943 Parrot informed him that the film was getting scarce, and that they might have to discontinue since they could not supply all the advertising film that was wanted.

On cross-examination he testified:

- "Q. To the best of your recollection, the theatre managers told you they were under exclusive contract with United?
- "A. Well, I wouldn't say whether it was United or Alexander in that case. I don't remember; I don't recall, one of the two of them. In fact, the only competition that I saw was the Alexander and United in my territory. That is all I ever ran into was United or Alexander, one or the two of them." (R. vol. II 5)
- W. Bill Reichert testified that he was unable to continue to place film advertising on the screens of certain theatres because of exclusive agreements between the theatres and M.P.A. (R. vol. II 5-8)

On cross-examination he testified:

- "Q. Did you ever make an attempt to secure screen privilege with that circuit (Jefferson Amusement Company) after you saw Alexander's contract had expired?
- "A. Yes.
- "Q. For the whole circuit?
- "A. Yes.
- "Q. But not offering to pay them any guarantee for the whole 40 theatres?
- "A. Not as much as they wanted.
- "Q. Not anything?
- "A. Yes.
- "Q. What was the basis you offered?
- "A. \$3.00 an ad basis for all their theatres with a guarantee of \$3.00, and an option of \$4.00.
- "Q. What did they want?
- "A. \$7.50.
- "Q. You were not willing to meet that?
- "A. No, sir, I was not willing to meet that.
- "Q. Why did they turn you down?
- "A. They wanted more money.
- "Q. Was Alexander paying them more money?
- "A. At that time M.P.A. had the circuit—I think you had a split with them—a split service.
- "Q. What I mean to say is this—were you going in and offering to pay the theatre more money than they were getting, or less money?
- "A. Less money than they were getting.

- "Q. So, in other words, they would not give you the theatre screens because your offer was less than what they were getting?
- "A. That is right.
- "Q. And the same thing is true with the Jefferson Amusement Company—They were able to secure more money from your competitors than you were willing to pay, and for that reason they would not give you the forty theatres. Is that right?
- "A. That is right." (R. vol. II, 15-17)

Mr. Reichert further testified on cross-examination:

- "Q. Mr. Reichert, in the cases in which you have tried to secure screens for your own Company, is it or is it not a fact that Alexander has been in competition with you for obtaining of those screens.
- "Mr. Collins: I object to that.
- "Trial Examiner Kolb: The objection will be overruled?
- "Mr. Rosen: You can answer the question.
 - "A. Yes.
 - "Q. Is it also true that M.P.A. has been in competition with you for obtaining those screens?
- "A. Yes.
- "Q. Is it also true that all three of you have been in competition with each other for those screens?
- "A. To the best of my knowledge it is true."
 (R. vol. II 18)

The witness further testified:

"Q. Have you ever had occasion to offer M.P.A. advertising which you had obtained for exhibition on theatre screens under contract to M.P.A.?

- "A. Yes.
- "Q. Have they refused to exhibit the films?
- "A. Not when possible.
- "Q. And in the cases in which they did exhibit the advertising that you wanted exhibited, you were paid the customary commission, were you not, of 15 per cent less 2 per cent discount—I should say plus 2 per cent discount?
- "A. I was allowed that commission."
- "Q. Isn't that the usual advertising commission in the industry?
- "A. That is the usual advertising commission in the industry." (R. vol. II 18-19)

Mr. Reichert, the Commission's own witness, also testified on cross-examination:

- "A. I would say from my experience over these years, are 7 or 8, that it is disadvantageous to everyone concerned.
- "Q. For what.
- "A. For a possibility to exist where a theatre has more than one contract with distributors
- "Q. As I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous to all concerned—meaning everybody, the theatre and the distributor?
- "A And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought it, in fact." (R. vol. II 11)

- "Q. I understood you to say that it was disadvantageous in your opinion, to all concerned.

 I was trying to show the practical difficulties of doing business in the way the Government suggests it be done.
- "A. I say it would be a disadvantage to the distributor; yes.
- "Q. Now, taking up the practical difficulties with regard to the theatre itself, if, as you say, the theatres or most of them limit the advertising to four films per performance, what is the disadvantage or practical difficulty to the theatre in doing business with more than one distributor at the same time?
- "A. He makes enemies in the majority of cases because the advertisers, 90 per cent. of the time are his neighbors, attend his theatre, it would be an embarrassment to the advertiser and the theatre man, because the theatre man, himself, just wouldn't know what it was all about." (R. vol. II 13)

Robert Weigand and Rene P. Karrigan testified that they were officers of Commerce Pictures Sales, Inc., a company engaged in the business of the production and distribution of advertising films; that the Company had distributors which entered into screening agreements with theatres; that in some instances they were unable to enter into contracts with theatres because the theatres had exclusive screening agreements with M.P.A. (R. vol. II 22-32, and 32-40)

Weigand testified on cross-examination in connection with his Company's failure to obtain a contract with Jefferson Amusement Company, as follows:

- "Q. I understood you to say with regard to Jefferson Amusement Company, you had shown a few films on a test basis and never had gotten a contract from them. Is that right?
- "A. That's right.
- "Q. Isn't it a fact that subsequent to the test that you made, the Motion Picture Advertising Service Company went in and secured a contract for screening privileges?
- "A. Yes. By paying some foreign corporation more than the sum we would be prepared to pay.
- "Q. They paid the theatres more money than you ever had to pay; that is why they got the contract?
- "A. That's right." (R. vol. II 26)

Weigand further testified on cross-examination, as follows:

- "Q. Those contracts that are now held by your distributors are exclusive, are they not?
- "A. Yes." (R. vol. II 27)
- "Q. Is your Company and your distributor in open competition with the Motion Picture Advertising Service Company in securing screen privileges from theatres in the territory that you testified of?
- "A. In answer there are two ways of obtaining contracts. One is a non-exclusive contract, and another is an exclusive contract. In the case of an attempt for an exclusive contract, there is competition." (R. vol. II 27-28)
- "Q. Well, now, with regard to the present-day arrangement where you have exclusive con-

tracts with theatres, how many advertisements are those theatres willing to show?

- "A. This present-day arrangement, there is nothing modern about exclusive or non-exclusive contracts. Some theatres have exclusive and some non-exclusive. Those non-exclusive are the ones that no one has ever offered enough money to make them exclusive." (R. vol. II 30)
 - Q. Has the Motion Picture Advertising Service Company ever refused to exhibit films for advertisers with whom you have contracts on screens that are available to the Motion Picture Advertising Service Company?
 - "A. Did you say ever?
 - "Q. Yes.
 - "A. That would involve my giving a specific instance of a refusal. I wouldn't be able to give a specific instance of a refusal.
 - "Q. Mr. Wiegand, have you ever requested the Motion Picture Advertising Service Company to exhibit film advertising of your customers on screens under contract to them?
 - "A. Yes.
 - "Q. Have they generally accepted the business?
 - "A. Yes.
 - "Q. Have they ever refused to accept the business?
 - "A. * I couldn't think of a specific instance in which we were refused." (R. vol. II 31-32)

Rene P. Karrigan testified on cross-examination with regard to his Company's inability to obtain a screen-

ing contract with Jefferson Amusement Company, as . follows:

- "Q. When you first contacted the Jefferson Amusement Company were they running any screen advertising on their screens?
- "A. I don't believe so.
- "Q. You made a test run in one theatre free of charge in order to try and negotiate a contract with them for screen advertising rights?
- "A. Right.
- "Q. After that test run Motion Picture Advertising Service Company made a proposition to them, as a result of which Jefferson Amusement Company entered into a contract with Motion Picture Advertising Service Company, isn't that correct?
- "A. That's right." (R. vol.\II 33-34)

Karrigan further testified on cross-examination:

- "Q. You testified with regard to the Billy Fox?"
 Theatres. I understand one is the Fox Theatre in Bunkie, and one was the theatre in Marksville.
 - "A. Yes, sir.
 - "Q. Who has the screen agreements with those theatres at the present time?
 - A. The Exhibitor's Advertising Company.
 - "Q. That is your distributor?
- "A. That's right.
- "Q. * * What does the contract read?
- "A. The contract reads exclusive." (R. vol. II 37)
- "Q. Mr. Karrigan, does the Exhibitor's Advertising Service have theatre screening agreements with the Don Theatre of Alexandria?

- "A. Yes.
- "Q. The Davis of Bossier City?
- "A. Yes.
- "Q. And the Lake Theatre in Shreveport, Louisiana?
- "A. Yes.
- "Q. Are those contracts exclusive contracts or non-exclusive?
- "A. Exclusive with the Exhibitor's Advertising Company.
- "Q. That is your distributor?
- "A. That's right," (R. vol. II 39)
- "Q. Isn't it true in your experience in booking the films through M.P.A. that they have generally accepted the business in screening and advertising?"
- "A. They have accepted the majority of the business that we have offered." (R. vol. II 39)

On redirect examination Karrigan testified:

- "Q. Mr. Karrigan, counsel asked you if you were able to have your ads screened in more theatres by having access to the theatres controlled by M.P.A. Does the existence of exclusive contracts between M.P.A. and the different theatres give you and your distributors a wider distribution of your advertising films?
- "A. To a certain extent." (R. vol. II 39-40)

Nobles C. Campbell testified that he was a distributor of Parrott Films in Kentucky, West Virginia, Virginia and North and South Carolina, and that he had been unable to do business with certain exhibitors because competitors had exclusive screening agreements. (R. vol. II 40-42)

On cross-examination he testified:

- "Q. When you would go into any theatre and get the right to exhibit films, how long would that right exist, for one day, one week, or one year?
- "A. That would be up to the theatre.
- "Q. Generally; give me a general case.
- "A. Generally four weeks is my system.
- "Q. Four weeks?
- "A. Yes.
- "Q.. So that you would go into the theatre and get a right from them to exhibit some films for four weeks?
- "A. That is right. Then I would call on that theatre three or four times a year. In other words, in place of running continuous I would run a month and off two or three months.
- "Q. Then the number that you would put on the screen would depend upon your ability later to sell the ads?
- "A. That is right.
- "Q. And if you sold ten they put ten on?
- "A. That is right.
- "Q. And if you sold two they put two on?
- "A. That is right.
- "Q. And if you sold none they put none on?
- "A. That is right.
- "Q. Therefore, unless you had made some guarantee of a minimum to the theatres, they would never know after making the contract

with you what consideration they would get from you for that contract, would they?

- "A. Until I told them the total." (R. vol. II 46-47)
- "Q. Let me ask you a question about that. Suppose you went into a theatre that was willing to write any kind of an arrangement you wanted. I understand that your policy is that you would run for one menth and then be off for three months?
- "A. That is right.
- "Q. That is your way of doing business?
- "A. That is right.
- "Q." So that according to your method the theatre would get consideration for the month it ran its ads with you and the next three months they wouldn't get any ads?
- "A. That is right." (R. vol. II 51)

Ernest Hugh Forsythe, a witness for respondent, testified as follows:

- "Q. What was your arrangement with Theater Publicity Service as to when they should pay you for screening?
 - "A. Well, the contract called to be paid, you know, on the first of the month but when I was running the ad they paid me every week. That is how come me to run it six weeks without trying to find out anything about it because I figured they would pay me after it run a month, and I run it for six weeks and I still had not received any check for them or heard from them.
 - "Q. Then what did you do?,
 - "A. Then I called them and their phone was temporarily disconnected and I tried to find out

what was the matter and I couldn't find out, so I took the ad off the screen.

- "Q. Did you ever put the ad back on the screen?
- "A. No, sir.
- "Q. Were you paid for the six weeks service that you had run?
- "A. No. sir.
- Q. You had been paid for the prior six or seven weeks—
- "A. Yes, sir.
- at the beginning? Have you at any time been paid for the last six weeks that you ran it?
- "A. No, sir." (R. vol. II 226)

That M.P.A. has not unduly suppressed competition is amply shown by the testimony that theatres frequently change distributors from time to time. There were introduced in the record 49 letters received by M.P.A., 29 of which were notices from theatres that their screens had been taken away from M.P.A. and given to competitors, and 20 of which were notices from theatres that their screens had been taken away from competitors and given to M.P.A. These are the samples of the vast amount of competition that exists among the distributors to obtain theatre screening agreements. (R. vol. II 84)

The record further shows that about one-third of M.P.A.'s contracts come up for renewal each year, so that the average length of the agreements is about three years. Under the circumstances shown to exist, competitors of M.P.A. have the right to, and actually do, compete for these contracts at all times, and are able to take away from M.P.A. a third of its contract seach

year. The success of competitors in taking away the theatres depends chiefly upon the amount they are willing to pay to the theatres. It also depends upon the quality and character of the advertising films, and the ability of the distributors to pay the theatres in accordance with contract. Theatres themselves frequently insist upon guarantees, sometimes payable in advance, and some also insist upon contracts having a duration in excess of one year. It would not be profitable to pay the guarantee demanded for a one-year contract, even if the theatre were willing to accept such a short term. No contract at all could be obtained if the theatre demanded a contract for a longer term than one year, and the courts prohibited M.P.A. from making such a contract.

We submit that since the record shows that there is now, and always has been from the very beginning of the business, free, open, active and substantial competition among film advertising distributors, no showing whatever has been made by the Commission that the contracts of M.P.A. unreasonably restrain competition, or tend to create a monopoly. If the duration of the contract is cut down, there will be imposed upon the parties an arbitrary and unreasonable rule which would cause injury to the theatres, the distributors, the advertisers, and would not be in the interest of the public.

As pointed out by Commissioner Lowell B. Mason in his dissenting opinion, the chief benefactor of motion picture advertising is the small theatre owner, and the revenue thus obtained by the small theatre owner is a subsidy to keep him alive. Large deluxe theatres universally refuse to permit advertising on their screens. To say that a theatre owner has the right to lease the

roof of his theatre for an advertising sign for a period of five years is legal, but to lease the use of his screen for the exhibition of motion picture advertising for any period in excess of one year is illegal, is obviously unsound. No one has ever contended that outdoor advertising companies may not lease vacant lots for any period of time they choose, but now it is contended, for the first time since the inception of this industry more than thirty years ago, that theatre screens may not be leased for motion picture advertising for more than one year.

Furthermore, we submit that the record fails to establish that the contracts of M.P.A. tend to create a monopoly. At the time of the trial of this case in 1947 there were approximately 20,000 theatres in the United States, of which about 12,600 exhibited screen advertising. M.P.A. has exclusive contracts with about 1100 for a period of five years, or about $5\frac{1}{2}\%$ of 20,000, and 8.7% of 12,600. These are the contracts now sought to be banned by the Commission. It is obvious from these figures that M.P.A. has no monopoly of screens by virtue of its five-year exclusive contracts.

In order to try to establish that M.P.A. has a monopoly, the Commission has added together all the exclusive contracts of M.P.A. and all those of the other three distributors, against whom complaints were instituted, (many of which were for one year terms), and then argues that the total number of exclusive agreements held by all four respondents in the aggregate approximated 75% of the total theatres willing to show screen advertising. This argument is amply refuted in the dissenting opinion of Commissioner Lowell B. Mason, who said:

"The majority opinion written to apply to the four companies sued states:

"'The total number of exclusive agreements held by respondents in the aggregate approximated 75% of total number.'

"To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify antimonopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all the others approximated 100% of the total industry." (R. 70)

Commissioner Mason further said:

"I do not believe we should prohibit a theatre owner from leasing exclusive space in his lobby, his basement, his roof or even on his scheen for as long as he wants provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theatre owners) may want to sell, namely a lease for more than one year.

"As I pointed out at the beginning, trailer ads are a source of income to small theatres. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income which represent the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer

period was an unfair act or practice in commerce." (R. 69)

The Commission suggests that it substitute its judgment as to the duration of the contract for that of the theatre owner and the distributor, and this despite the fact that the record establishes that there is, and always has been, free and open competition among the distributors to secure such contracts, and that from the beginning of the industry, distributors have sought and obtained exclusive screening agreements for periods of one to five years.

The Court of Appeals, after a full consideration of this matter, said:

and open competition among the distributors to secure such agreements, and that, from the beginning of the industry, distributors have sought and obtained exclusive screen agreements. The Commission having determined that exclusive agreements are not unfair or illegal per se but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person would invest sufficient capital in the business without assurance of exclusive screening space for a longer period than one year; and that theatres themselves frequently demand guaranties for a longer period, or otherwise refuse to exhibit motion picture advertisements.

"The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites

to the power of the Commission to issue its order in this case to cease and desist. Cf. Federal Trade Commission v. Raladam Company, 283 U.S. 643, 646, 648.

"Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

"Therefore, with available space and time for advertisements on the screen of motion-picture exhibitors severely limited, and with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioners' method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. berg v. Tri-State Theatre Corp., 126 F. (2) 26; United States v. Western Union Telegraph Co., 53 Fed. Supp. 377. * * * " (R. 82-86)

In the case of Goldberg v. Tri-State Theatre Corp., 126 F. 2d 26 (CCA 8th, 1942), two theatre buildings in Omaha, Nebraska, were owned by the same party. The buildings were the State Theatre building and the World Theatre building. The assignee of Tri-States Theatre

Corp. had entered into a sublease covering the World Theatre building, which sublease agreement contained a covenant that the owner would not use or permit the use of the State Theatre building as a motion picture theatre. The State Theatre building was thereafter used as a motion picture theatre in violation of this restrictive covenant and a suit was filed to enjoin such use.

The Court, in an opinion by Johnson, Circuit Judge, in upholding the validity of such a restrictive covenant, and in granting the injunction, at page 29 said:

"The validity of the agreement, as a restraint upon trade, is not seriously open to question under the general contract law of Nebraska. An agreement which places a restriction upon the use of certain real estate is not invalid in Nebraska, as being an unreasonable restraint of trade, where the restriction is purely ancillary to the acquiring of an interest in another piece of real estate for commercial purposes; where it places only a limited restraint as to period and manner of the use of such property; where it does not appear to be greater than reasonably to serve as a protection in accomplishing the legitimate commercial purpose for which the interest in the other real estate involved was acquired; and where it does not have as its primary object or as its direct result the fostering of some illegal monopoly."

In the case of *United States v. Western Union Telegraph Company*, et al., 53 Fed. Supp. 377, a proceeding in equity was instituted by the United States against Western Union Telegraph Company and certain of its officers to enjoin the enforcement of certain exclusive contracts that had been entered into with various railroad, transportation and terminal companies, hotels, public buildings and sports arenas. The agreements were

lease arrangements whereby Western Union, as lessee, was granted the exclusive right of occupancy, the lessors covenanting that during the term of the agreements no space in the premises would be leased to competing telegraph companies. The petition charged (a) a conspiracy among the defendants to restrain trade in commerce; (b) that the enforcement of the contracts was in restraint of trade in commerce; and (c) that the defendants had attempted to monopolize interstate trade in commerce in telegraph communication.

The District Court for the Southern District of New York, in an opinion by Nevin, D.J., at page 381, stated the question for determination as follows:

"The Government's case stands or falls on the question whether the contracts, singly or in the aggregate, constitute a violation of the Sherman Act. Section 3 of the Clayton Act, 15 U.S. C.A., § 14, prohibiting certain restrictions in connection with the sale or lease of tangible property, the source of so many of the decisions on which the Government usually relies in anti-trust cases, does not apply and is not invoked. The Federal Trade Commission Act, 15 U.S.C.A. § 41, et seq. does not apply to telegraph companies and is not invoked. The question arises under the Sherman Act alone, and the issues are these: (1) Whether. the contracts are unlawful restraints of trade under Section 1. (2) Whether, if not, defendants can be held to have unlawfully monopolized or attempted to monopolize commerce under Section 2 by means of a series of such contracts any of which separately would concededly be lawful."

The Court held that the Sherman Act had not been violated and ordered the petition dismissed, and, in so holding made, among others, the following Conclusions

of Law at page 392:

- "3. The defendant company and its officers, the individual defendants have not engaged in a conspiracy to restrain trade and commerce in telegraph communication and to monopolize such commerce by making exclusive contracts with railroad, transportation and terminal companies, the owners of hotels, public buildings and sports arenas, for the purpose of excluding competing telegraph companies from such premises and therefore have not violated Sections 1 and 2 of the Sherman Anti-Trust Act.
- "4. The exclusive contracts entered into by the defendant company and railroad, transportation and terminal companies, the owners of hotels, public buildings and sport arenas, while gaining for the defendant company a competitive advantage, do not constitute an unreasonable restraint of interstate trade and commerce in telegraph communication in violation of Section 1 of the Sherman Anti-Trust Act.
- "5. The exclusive contracts with railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas entered into by defendant through its officers and agents, do not form a part of a nationwide plan to exclude competing telegraph companies from such locations, but rather are of the usual incidents attendant to a vigorous prosecution of the business of the defendant, and the defendant company and its officers and agents have not attempted by means of such contracts to monopolize interstate trade and commerce in telegraph communication in violation of Section 2 of the Sherman Anti-Trust Act.
- "6. The exclusive provisions of the contracts between the defendant and the railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas

are lawful and valid and not in violation of the terms of Section 1 and 2 of the Sherman Anti-Trust Act."

The Court of Appeals in reversing the Commission in the case at bar also held, and we submit correctly, that the contract between respondent and the theatre is one of agency, citing Federal Trade Commission v. Curtis Publishing Company, 260 U.S. 568. In that case this Court upheld an exclusive agreement between Curtis Publishing Company and its distributors requiring the distributors to distribute the periodicals of Curtis Publishing Company to the exclusion of the periodicals of all other competitors during the term of the contract, and, at pages 581 and 582 said:

"The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of tall others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient,

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the or-

derly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute." (Emphasis supplied)

That case presents an exact parallel with the case at bar. There, Curtis Publishing Company entered into agreements with news dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, respondent enters into agreements with theatres whereunder the theatres are appointed as agents of respondent to display the advertising films of respondent, subject to the condition that the theatres will not, during the life of the contract, display the advertising films of competitors.

We submit that the principle announced in the Curtis case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive, does not constitute an unfair method of competition, and affords no ground for condemnation under the statute. The Commission contends that the Curtis case is not in point, on the ground that the screening agreements are not contracts of agency, but are purchase and sale agreements of screen space in the theatres, and quotes the language of the contract, which states:

"The exhibitor transfers, sells and assigns to the distributor the exclusive screen advertising privileges " " "

Despite this language, the courts of several states have held that these agreements are not contracts of

sale but are mere contracts of agency in which the theatre owner is appointed as the agent of the advertising distributor to exhibit advertising films on his screens. These decisions were rendered in cases involving occupational license taxes. In deciding that the distributor did a local business in the state in which the theatre was located, the courts have uniformly held that the docal business consisted of the exhibition of advertising films on the screens of the theatre through the medium of the theatre owner as an agent appointed by the distributor. See State For Use of Independence County v. Tad Screen Advertising Co., 133 S.W. 2d 1.

We, therefore, submit that the Court of Appeals was correct when it sau:

"In another aspect, we have here a contract of agency, and our decision is governed by Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely granted the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement; and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period."

Decisions Cited by Commission Inapplicable

All of the cases cited by the Commission are easily distinguishable from the case at bar.

Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, is cited to show that a violation of Section 3 of the Clayton Act is per se a violation of Section 5 of the Federal Trade Commission Act. In that case the Federal Trade Commission sought to obtain a cease and desist order against several manufacturers of women's garments and manufacturers of textiles used in their making, on the ground that they had entered into a combination and conspiracy to refuse to sell manufacturers and retailers of garments who dealt in the products of others who copied their designs and generally sold them at lower prices, and in order to effectuate the boycott, the combination employed shoppers to visit the retailers' stores, established tribunals to determine whether garments were copies of their own designs, audited the books of its members, fined them for violation of its regulations, etc. The respondent argued that their boycott and restraint of interstate trade was not within the ban of the policies of the Sherman and Clayton Acts because their practices were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the evils accruing from the pirating of original designs, and had in fact, benefited all four. But this Court held that the purpose and object of the combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon rival competitors,

all brought it within the prohibition declared by the Sherman and Clayton Acts. For this reason, the Court held that it was not error to refuse to hear the evidence offered, for the resonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination. There, the respondents were charged with a conspiracy to restrain trade, and the conspiracy and the restraint were duly proved against them. Their only answer was that the methods used by them in carrying out the conspiracy were reasonable and benefited the conspirators. Once the conspiracy was proved and the object sought to be accomplished by it was found to be unlawful, the reasonableness of the methods used to carry out the unlawful conspiracy were, of course, immaterial.

In our case, no conspiracy whatever is charged, and no unreasonable restraint of trade is shown.

Likewise, the inapplicability of the case of Carter Carburetor Corporation v. Federal Trade Commission, 112 F. 2d 722, is illustrated by the fact-that the Carter Carburetor Corporation, by contract with its dealers and distributors, required them to carry a stock of equipment and parts, and provided for the price to be paid or the discounts to be received. In addition, all dealers were notified that if they took on "a new carburetor line without our written approval, preferential discount, service information, and Carter contract, if any, will be discontinued by the Carter distributors." In addition, confidential bulletins were sent to all regional and 20ne distributors, requesting them to call on all dealers handling the Chandler-Grove carburetor line, and advise such dealers that if they continued to handle the Chand-

ler-Grove carburetor line after a certain date, their Carter contracts would be cancelled. It was shown that the Carter carburetor was used by a majority of the car manufacturers and, therefore, the Carter dealers had no choice but to cancel their dealings with competitors. The facts clearly indicate a violation of Section 3 of the Clayton Act.

There is no proof in the case at bar that the purpose of M.P.A.'s contracts are to hinder competition, or tend to create a monopoly. As a matter of fact, paragraph 3 of the Complaint in this case charges, and it is conceded, that there is free, open, active and substantial competition between M.P.A. and other distributors of motion picture advertising films for the securing of theatre screening agreements.

The Commission also cites the case of International Salt Company, Inc. v. United States, 332 U.S. 392, in which the Government sought to enjoin International Salt Company, Inc. from carrying out provisions of its leases of patented machines, which provided that lessees would use therein only International's Salt products. This Court there held that the agreements were in violation of Section 3 of the Clayton Act. This is a typical Tying Clause Arrangement which Section 3 of the Clayton Act was specially enacted to prohibit. It is obvious that that case has no application whatever to the case at bay.

Again, in the case of Standard Oil Company of California v. United States, 337 U.S. 293, Standard entered into contracts with independent dealers, which contained requirements that such dealers purchase all or a specified portion of their products from Standard, thereby prohibiting the dealers from making any purchases

from competing oil companies. This, again, was held to be violation of Section 3 of the Clayton Act, and the Federal Trade Commission here seeks to use the holding of the Court in that case as authority for the case at bar, notwithstanding the fact that M.P.A. admittedly has not violated Section 3 of the Clayton Act, and is not charged in the complaint with so doing. In the Standard Oil case there was no question as to what constituted a reasonable length of time for the exclusive contracts to run. Standard Oil Company was the seller, whereas here, M.P.A. is the lessee of screen time in theatres. The Standard Oil case is, for these reasons, completely distinguishable.

In the case of Federal Trade Commission v. Cement Institute, 333 U.S. 683, this Court upheld an order of the Federal Trade Commission which required cement manufacturers and an association formed by them to cease and desist from acting in concert in pricing their goods on a multiple basing point system by which, irrespective of the location of the mill, the price would always be the mill price at the basing point plus freight, as being an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act, and for the further reason that the combination to use such system had effected a systematic price discrimination in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Section 2-a of that Act declares it to be unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly. There was, therefore, a specific violation of Section 2 of the Clayton Act. In the instant case, there is no element of price discrimination, and, again, the

Cement Institute case does not involve exclusive contracts.

In the case of Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441, it was held that the action of a manufacturer in issuing circulars to its trade suggesting uniform resale prices, both wholesale and retail, to be charged for its products, and in refusing to continue to sell to any dealer who failed to maintain such prices, or who sold to another dealer failing to maintain them, was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. This ruling does not strike at exclusive contracts but at price fixing by manufacturers. In our case, prices are in no way involved.

The case of Federal Trade Commission v. Pacific States Paper Trade, 273 U.S. 52, is also a price fixing case, and, as such, is entirely distinguishable from the instant case.

The Commission attempts to argue that although M.P.A. is not here charged with a violation of Section 3 of the Clayton Act, but only with a violation of Section 5 (a) of the Federal Trade Commission Act, any violation of Section 3 of the Clayton Act is per se an unfair method of competition and as such a violation of Section 5 (a) of the Federal Trade Commission Act. In its brief, the Commission states on pages 25-26:

Clayton Act reflects a strong public policy against exclusive-dealing arrangements. That section flatly prohibits such agreements by buyers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. Standard Oil Co. v. United States,

337 U.S. 293; Richfield Oil Corp. v. United States, 343 U.S. 922. Although the contracts in the instant case are presumably not within Section 3 since the exclusive commitment is by the seller of screen space (the theatre) rather than by the buyer (respondent), the effect on competition is the same in either situation. The basic public policy against exclusive-dealing arrangements which adversely affect competition, as declared by Section 3 of the Clayton Act, brings respondent's exclusive contracts within the Commission's authority to prohibit unfair methods of competition."

At a glance it will be seen that the argument is that although M.P.A. is not in violation of Section 3 of the Clayton Act (because it is not the seller or lessor of theatre screens, but is the purchaser or lessee thereof), nevertheless, the effect of M.P.A.'s exclusive screening contracts is exactly the same as it would be if M.P.A. had violated Section 3 of the Clayton Act. M.P.A. simply enters into exclusive screening agreements with theatres, not as the seller or lessor-but as the purchaser or lessee of screen space under an agreement whereby the theatre is appointed as the agent of M.P.A. to exhibit M.P.A.'s advertising upon its screens for a limited period of-time. Considering the limited amount of screen space available for advertising, M.P.A. could not afford to pay the large guarantees demanded by the theatres for the screen space, unless it could be assured of the availability of this space for a reasonable period of time.

In making the contention that exclusive theatre screening agreements constitute a violation of Section 3 of the Clayton Act, the Commission has assumed the very issue in the case. M.P.A. does not admit that its screening agreements constitute a violation of the Clayton Act, or that they constitute an unfair method of competition.

Film advertising affords the theatre owner a desirable source of extra revenue. This revenue is secured by the theatre owner entering into exclusive theatre screening agreements for reasonable periods of time. Many theatre owners demand large guarantees and a considerable proportion of the advertising revenue for making their screens available. Certainly, M.P.A. could not pay the consideration demanded unless it could be assured that the limited space acquired would be available to it when a contract was later entered into with an advertiser.

Plea of "Res Judicata"

M.P.A. filed a plea of "res judicata" on the ground that the sole issue raised in this complaint has been adjudicated in the former complaint brought by the Federal Trade Commission in the matter of "Screen Broadcast Corporation, et al." Docket No. 4736; 36 F.T.C. 957, and, therefore, the present complaint should be dismissed.

The plea was overruled by the Commission, and although urged in the Court of Appeals was not passed on since the Court rested its decision on the merits.

The sole issue raised in the present complaint is whether the provision in theatre screening agreements whereunder M.P.A. is granted for limited periods of time an exclusive privilege of exhibiting commercial advertising films on the screen of the theatre under contract has the effect of restraining competition, and constitutes an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. This very issue was presented in the complaint brought by the Commission on March 19, 1942 in the matter of "Screen Broadcast" Cor-

poration, et al.", Docket No. 4736, against M.P.A. and other respondents therein named. There was a final adjudication upon this issue.

In the former complaint, Docket No. 4736, the Commission alleged in Paragraph Four, sub-paragraph (a) as follows:

> "The respective respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

and in Paragraph Seven of said complaint, the Commission further alleged:

"The acts and practices of the respondents as herein alleged are all to the prejudice of competitors of respondent distributors and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented, competition in the sale, leasing, rental and distribution of commercial motion picture films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial motion picture films and have a dangerous tendency to create in respondents a monopoly in the sale, leasing, rental and distribution of said films, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

M.P.A. answered Paragraph Four (a) as follows:

"Respondents admit the allegations of subparagraph (a) of PARAGRAPH FOUR of the Complaint, except that respondents deny that all such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary, the vast majority of such contracts with motion picture theatres are non-exclusive in character, and respondents further deny that such contracts with theatres are usually for a period of five years."

and M.P.A. denied the allegations of Paragraph Seven.

M.P.A. agreed to a stipulation of facts with the Commission under date of August 31, 1942. Said stipulation contains the following admission:

"The respective respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

After a full and complete hearing upon that complaint, including the issue above set forth, the Commission rendered a decision, dated June 25, 1943, and a cease and desist order based thereon. Under Paragraph Five of the findings of fact in said decision, the Federal Trade Commission found:

"The respondent distributors, acting in cooperation with one another and through and in
cooperation with respondent GSA, respondent Association, and respondents J. D. Alexander and
C. J. Mabry, have at various times since the year
1933, and particularly during and since the year
1937, entered into understandings, agreements,
combinations, and conspiracies between and among
themselves and with other film distributors as to

"Pursuant to such understandings, agreements, combinations, and conspiracies, and in
furtherance thereof, these respondents have acted

in concert and in cooperation with one another in doing and carrying out the following acts and practices:

entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by such exhibitors for a specified period of time, usually for five years " "

The cease and desist order rendered pursuant to said opinion covered the very same issue here presented again, namely, the right of respondents to enter into exclusive screening contracts with theatres, since the cease and desist order in the former case contained the following prohibition:

"IT IS ORDERED that respondent Association of Advertising Film Companies, an unincorporated trade association, and its officers; respondents C. J. Mabry, individually and as Secretary of said Association; respondent distributors, Motion Picture Advertising Service Co., Inc., United Film Ad Service, Inc., Ray-Bell Films, Inc., Alexander Film Co., and A. V. Cauger Ser-. viće, Inc., corporations, and their respective officers; and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, leasing, renting, and distribution of commercial motion picture films in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto. to do or perform any of the following acts or things: * * "

2. Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial motion picture films in theatres owned, controlled, or operated by such exhibitors."

Compare the above order with the relief sought in the former proceeding by the Commission. On the issues alleged in the former complaint the Commission sought to obtain a cease and desist order to prevent respondents from entering into individual exclusive theatre screening agreements, whether such agreements were the result of a combination or conspiracy, or were merely the individual acts of each respondent, but the Commission refused to grant the full relief asked, and limited the prohibition in the cease and desist order to the entering into of exclusive theatre screening agreements only where they were made as the result of a combination or conspiracy, leaving each individual respondent free to enter into exclusive contracts so long as they were the individual acts of the respondent and not the result of a combination or conspiracy. The Commission did not decide that no issue was raised in that complaint concerning the right of each individual respondent to enter into exclusive theatre screening contracts, but, on the contrary, decided that this was an issue in the case, and resolved that issue against the Commission, and limited the prohibition in the cease and desist order to exclusive . contracts only where they were the result of a combination or conspiracy.

That the same issue was raised in the former proceedings as is here presented is amply shown by the following quotation from pages 9 and 10 of the brief

of Mr. Everett F. Haycraft, trial attorney in the former case:

"CONCLUSION AND RECOMMENDATION."

"In conclusion counsel for the Commission respectfully submits that the record—in this case discloses indisputable facts which support the charges of the complaint and that the activities of the respondent herein are unfair methods of competition and violate the provisions of Section 5 of the Federal Trade Commission Act. In this connection it is recommended that an order be entered against the respondents substantially as follows:

- "IT IS ORDERED that the respondent distributors (naming them), their officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, selling, leasing, renting or distributing commercial motion picture films in commerce as commerce is defined in the Federal Trade Commission Act do forthwith cease and desist from:
- "'(4) Entering into contracts with moving picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial or advertising motion picture films in theatres owned, controlled or operated by said exhibitors, for any specified period of time, provided, however, that any respondent distributor may cor' act with any exhibitor for the exclusive showing of a single national advertising campaign by means of motion picture film for any national advertiser; " " (Emphasis supplied)

A reference to the ten numbered paragraphs contained in Mr. Haycraft's recommended form of cease

and desist order shows that all of said paragraphs, except paragraph (4), specifically mention that the respondents are not to conspire, combine, cooperate or enter into agreements with each other covering the subject matter of each individual paragraph of the order. Paragraph (4) alone of the recommended order deals only with the individual acts of each respondent in entering into exclusive theatre screening contracts with motion picture Paragraph (4) has no reference whatever exhibitors. to conspiring, combining, cooperating or entering into agreements with each other. The complaint in the former case charged that each respondent distributor entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films. The stipulation of facts admitted that allegation of the complaint. Mr. Haycraft, counsel for the Commission, recommended that the cease and desist order prohibit respondent distributors from entering into individual exclusive theatre screening contracts. It is, therefore, clear that the complaint in the former case presented the same issue here presented, and that the attorney for the Commission sought there the same relief that is sought here, but the Commission refused to grant the full relief that he asked for.

If there were any lingering doubt as to whether the precise issue raised in the present complaint was also raised in the former complaint, such doubt is cleared up by correspondence from Mr. Delos C. Johns, a member of the firm of Morrison, Nugent, Berger & Johns, attorneys for United Film Ad Service, Inc., to Mr. Everett F. Haycraft, attorney for the Commission.

In connection with the Commission's requirement that each respondent file a report of compliance with

the provisions of said cease and desist order, the question arose as to the proper interpretation to be given to the above quoted paragraphs of said order, and, in connection therewith, Mr. Johns wrote Mr. Haycraft on August 6, 1943 as follows:

"The attorneys for some of the respondents find that they are not entirely in agreement as to the construction to be placed upon that part of the Commission's cease and desist order which deals with 'contract with motion picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial motion picture films in theatres owned, controlled, or operated by such exhibitors'. It is noted that there is a substantial difference between the wording of the Commission's order and the wording of the recommended order as set forth on page 10 of your brief. Specifically, the disagreement among counsel concerns the question whether the order prohibits the respondent advertising film companies from making exclusive contracts with theatres separately and independent of each other and without a planned common course of action, agreement, understanding, combination or conspiracy between or among the respondents, with respect to national advertising, or whether the order leaves each individual respondent company free to make exclusive contracts with theatres so long as it is not done pursuant to agreement, understanding, combination or conspiracy between or among respondents.

"Furthermore, there is a difference of opinion among counsel as to whether the Commission's order in any event requires the respondent companies to cancel the exclusive provisions of existing contracts with respect to national advertising, or whether the order only prohibits the making of new contracts containing exclusive provisions with respect to national advertising.

"It would be very much appreciated if some clarification of these questions could be obtained prior to the time when we are compelled to file our reports of compliance. Therefore, it is suggested, if you will be so kind as to do so, that you telephone me at my expense at your first convenience so that we may discuss the matter. I think it may be preferable for us to talk about it rather than merely to exchange letters. view of the congested condition of the long distance lines I suggest that, if convenient, you might call me at 10 o'clock, Central War Time on next Tuesday morning, August 10th, unless some other time is preferable to you, in which event I suggest you telegraph me in advance so that I can arrange to be in my office at your time." (Emphasis supplied)

On August 12, 1943, Mr. Haycraft telephoned Mr. Johns long-distance from Chicago to Kansas City and the substance of that conversation was reported by Mr. Johns to the attorneys for the other respondents in a letter of Mr. Johns, dated August 12, 1943, reading as follows:

"Not until today was I able to talk with Mr. Haycraft. He is in Chicago, and my letter was forwarded to him. He called me early this afternoon after having reviewed his file and refreshed his recollection.

"Mr. Haycraft states quite frankly that it appears to him that the Commission was unwilling to make the Order with respect to exclusive theatre contracts as stringent as he (Haycraft) had recommended. In other words, he says it appears that the Commission was unwilling to attempt to prohibit the making of exclusive contracts with theatres in all events, but was content, on the other hand, to prohibit only the use of exclusive theatre contracts, by design, agreement and con-

spiracy among the respondents, as a means of dividing up the territory for the purpose of servicing national advertising accounts. Mr. Haycraft states that in his view of the Order as entered any respondent may make a separate and individual contract with a theatre providing for the exclusive right to show motion picture advertising films, so long as the contract is not made or availed of for the purpose of effectuating an unlawful scheme between or among respondents with respect to national screen advertising.

"I asked Mr. Haycraft specifically whether in his view of the Order it would be necessary for us to cancel existing exclusive theatre contracts. Without hesitation his answer was 'no'. He pointed out that paragraph 2 on page 2 of the Order prohibits only entering into such contracts. I think it is significant that paragraph 2 omits the words 'continuing or carrying out'.

"Upon the basis of my conversation with Mr. Haycraft I am now satisfied to make and file a report of compliance which negatives the existence of any plan, common course of action, agreement, understanding, combination or conspiracy to which United is a party for entering into exclusive contracts with theatres concerning national advertising. I propose to advise United that it is not necessary for it to cancel its existing contracts with theatres " " (Emphasis supplied) (These two letters were stipulated in the record on September 9, 1947 as Exhibits RX-1, RX-2.)

From the above letters it is quite clear that the Commission refused to accept Mr. Haycraft's recommendation that the cease and desist order prohibit the making of exclusive contracts with theatres in all events, and limited the prohibition to the entering into of exclusive theatre contracts only where they were made by

agreement or conspiracy among the respondents.

What is sought in the present complaint is merely to re-try that same issue, which was decided against the Commission in the former proceeding.

In George H. Lee Co. v. Federal Trade Commission, 113 F. 2d 583, the Circuit Court of Appeals, Eighth Circuit, sustained a plea of "res judicata" to a complaint brought by the Federal Trade Commission under the following circumstances: There, respondent, a Nebraska corporation, was engaged in advertising, distributing and selling in interstate commerce a product called "Gizzard Capsules" as a remedy or vermifuge for worms in poultry. The complaint of the Commission was that the advertising falsely represented the curative qualities of said product and, accordingly, constituted an unfair trade practice within the meaning of Section 5 of the Federal Trade Commission Act. Respondent denied that advertising contained false representations, and further filed a plea of "res judicata" based upon the ground that prior to the institution of the complaint by the Commission, the United States had seized a shipment of the product of respondent, and had filed a libel proceeding, charging that the product was misbranded in violation of the Federal Food and Drugs Act, and that after a trial of said libel, the United States District Court for the Western District of Missouri had dismissed the Government's complaint upon a finding that the product was not misbranded.

The Commission disagreed with the findings of fact of the court in the libel proceeding, holding that the product was misbranded and, accordingly, rendered a cease and desist order. The Circuit Court of Appeals for the Eighth Circuit, passing solely upon the plea of "res judicata", said:

"Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit. * * The United States may not relitigate the same issue in successive libel proceedings involving different quantities of the same product, nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same. The rule is 'that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' *

"Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties. If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceeding, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it." (Emphasis supplied)

In the case of Proper v. John Bene & Sons, Inc., et al., 295 F. 729, the question was raised as to whether the plea of "res judicata" was applicable to the findings and order of the Federal Trade Commission. The court in an opinion by Garvin, District Judge, held that a Federal Trade Commission order was not a final judgment, therefore, the plea of "res judicata" was not available, and in so holding said:

"The result of the proceedings before the Commission is an order which has no effect in itself, unless made operative by the Circuit Court of Appeals, which has power of review. The doctrine of res adjudicata has no application unless a final judgment is involved."

The decision in the foregoing case was an interpretation of the Federal Trade Commission Act as originally enacted, which provided no time limit for an aggrieved party to seek judicial review. The Federal Trade Commission Act as amended provides that an order of the Federal Trade Commission shall be final at the expiration of 60 days if no appeal is taken.

The question as to the availability of the plea of "res judicata" was again raised after the amendment of the Federal Trade Commission Act in the case of United States v. Willard Tablet Co., 141 F. 2d 141. The court in an opinion by Major, Circuit Judge, held that since the findings and order of the Commission became final upon the expiration of 60 days under the Federal Trade Commission Act, as amended, the doctrine of "res

judicata" and its availability applies to a Federal Trade Commission proceeding with the same effect as it applies to any other judicial determination. In so holding, the court said:

> "We must, therefore, uphold the decision of the lower court that the issues of fact tried by the Commission have a finality upon which res judicata may be predicated."

A few of the many cases discussing the principle of "res judicata" are the following:

In the case of Southern Pacific R. R. Co. v. United States, 168 U.S. 1; this Court, in an opinion by Mr. Justice Harlan, said at page 377:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains This general role is demanded by unmodified. the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, of, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters

properly put in issue and actually determined by them."

In the case of Hemperly v. George Sliman & Co., 175 So. 767 (La.), the court said at page 768:

"It was because of the fact that the judgment made no mention of the claim for damages set up by intervener in his opposition that we held the judgment, by its silence on this claim, rejected the same, and therefore served as the basis for the plea of res adjudicata in this second suit for damages arising out of the same alleged illegal seizure."

In the case of Hunter v. Delta Realty Co., 169 S.W. 2d 936 (Supreme Court of Missouri) the court said at page 940:

" * * It is immaterial that the judgment did not expressly find against appellant on his claim for rents and profits accruing after judgment and pending delivery of possession pursuant thereto, because the effect of the judgment was to deny appellant's claim for such accruing rents and profits. Young v. Byrd, 124 Mo. 590, 597, 28 S.W. 83, 46 Am. St. Rep. 461; Scheppelmann v. Fuerth, 87 Mo. 351, 353. 'The legal effect of the silence of a judgment on any part of a demand that might have been allowed under the pleadings is a rejection of such part of the demand, which has the effect of res adjudicata against a subsequent action for that part.' 34 C.J. 818, § 1235."

In the case of Fidelity & Deposit Co. v. Citizens, Nat. Bank, 120 S.W. 2d 113 (Court of Civil Appeals, Texas) the court said at page 116:

"In Rackley v. Fowlkes, 89 Tex. 613, 36 S.W. 77, the Supreme Court said (page 78): 'The

proposition seems to be sound in principle and well supported by authority that where the pleadings and judgment in evidence show that the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause."

In the case of Board of Com'rs. for Buras Levee Dist. v. Cockrell, 91 F. 2d 412, the court said at page 416:

"Furthermore, 'The silence of the judgment on any demand which was an issue in the case under the pleadings must be considered as an absolute rejection of the demand.' Villars v. Faivre, 36 La. Ann. 398; Soniat v. Whitmer, 141 La. 235, 240, 74 So. 916; Edenborn v. Blacksher, 148 La. 296, 305, 86 So. 817."

In the case of United States v. Interstate Commerce Commission, 8 F. 2d 905, the court said at page 906:

"It is said by the appellant that the question of certiorari was not given serious consideration, either by the court or counsel, in the former proceedings. This, however, does not alter the situation, for the question was expressly raised in the case, and it was not reserved out of the judgment. It must therefore be considered as adjudicated therein."

In the case of Hockman v. Mortgage Finance Corporation of Pennsylvania, et al., 137 Atl. 252 (Supreme Court Pa.) the court said at page 253:

"It is a general principle of public policy, making for the general welfare, for the certainty of individual rights, and for the dignity and respect of judicial proceedings, that the doctrine of

res adjudicata should be supported, maintained, and applied in proper cases. Nor should its application be restricted by technical requirements, but a broad view should be taken of the subject, having always in mind the actual purpose to be The rule should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose—a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule. This is a unversal rule, and is well stated by our present Chief Justice in State Hospital v. Consolidated Water Co., 267 Pa. 29, 37, 110 A. 281. The requirements for application of the rule are that there be an identity of parties and of subject-matter in the two actions. The first of these requirements being present, all issues that were actually adjudicated in the former action are concluded (Bowers' 240 Pa. 388, 87 A. 711; First Nat. Bank of Wrightsville v. Dissinger, 266 Pa. 349, 109 A. 626); and, if the whole cause of action in the second case is the same as in the first, not only the issues actually adjudicated in the first proceeding, but also those which might have been raised and passed upon, are concluded. If, then, the issues in the present case could have entered into the determination of the first case, they should have been presented; and, if they were omitted for any cause, the judgment or decree entered thereon is conclusive between the parties or their privies. See Morrett v. Fire Ass'n., 265 Pa. 9, 12, 13, 108 A. 171." (Emphasis supplied)

In the former complaint brought by the Commission under Docket 4736, the Commission sought to obtain a cease and desist order:

- (a) to prevent M.P.A. from conspiring, combining, cooperating or entering into agreements with each other to fix advertising rates on the ground that this was an illegal restraint of trade; and
- (b) to prevent M.P.A. from individually entering into contracts for periods of one to five years with motion picture exhibitors for the exclusive privilege of exhibiting advertising motion picture films, on the ground that exclusive contracts constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

In the present complaint, No. 5498, the Commission again seeks to obtain a case and desist order to prevent M.P.A. from individually entering into contracts for periods of one to five years with motion picture exhibitors for the exclusive privilege of exhibiting advertising motion picture films, on the ground that exclusive contracts constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. This is the sole issue now presented, and is exactly the same as one of the two issues presented in the former complaint.

Not only do the pleadings in the former case show that the sole issue now presented was presented in the former complaint, but this is also borne out by the fact that Mr. Haycraft, counsel for the commission, in his brief recommended that the cease and desist order include a prohibition forbidding M.P.A. from individually entering into exclusive theatre screening agreements; and, while M.P.A. contended that such an order should

not be granted, no contention was made that this was not an issue in the case. On the contrary, both sides admitted that it was an issue.

After a full consideration of the matter, the Commission refused to grant this part of the relief asked, and limited the prohibition to the entering into of contracts with motion picture exhibitors for the exclusive privilege of exhibiting national adverting by means of commercial motion picture films in theatres, only in case said exclusive contracts were entered into as a result of a combination, conspiracy, or common course of action between or among any two or more of said respondents, or between any one or more of said respondents and others not parties thereto.

The Commission, having failed to obtain the full relief asked in the former complaint, now desires to retry one of the issues, and to obtain here the very relief which was denied in the former case.

It is to be borne in mind that there is no charge in the present complaint that M.P.A. has in any way changed its method of doing business, or the form or duration of its exclusive theatre screening agreements. All that is contended is that the present contracts, which contain the same provisions as the contracts referred to in the former complaint, constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. That very issue was presented in the former complaint. The parties involved are the same. The facts are the same.

The Government has had its full day in court on that issue and cannot re-try it now.

The fact that the decision and order in the former case did not set forth the reason for denying the relief

asked by Mr. Haycraft is immaterial, since under the pleadings and stipulation of facts the Commission could have included in its former order a prohibition against M.P.A. individually entering into exclusive theatre screening agreements. The silence of the former order on this point, coupled with Mr. Haycraft's statement that the Commission would not grant the full relief recommended by him, requires the application of the doctrine of "res judicata", just as though the former order, in so many words, rejected this part of the Commission's demand.

The general rule of law on this point is summarized in 50 C.J.S. page 102, Section 656, which states:

"The legal effect of the silence of a judgment on any part of a demand that might have been allowed under the pleadings is a rejection of such part of the demand, which has the effect of residucata against a subsequent action for that part, unless it reasonably appears that the parties themselves, and the court, did not consider the issues concluded."

M.P.A. has the legal right, individually, to enter into exclusive theatre screening agreements was not decided in the former proceeding, arguing that the issue in the former proceeding was limited by the pleadings to the right of the respondents named in that proceeding to/enter into exclusive theatre screening agreements as part of a common understanding, agreement, combination, or conspiracy between or among two or more of the respondent companies. M.P.A. contends that the complaint in the former proceeding did put this question at issue, but even if it should be concluded that the present issue was not raised by the former pleadings, nevertheless, the

issue was, with the consent of both parties, tried, considered and resolved against the Commission and, therefore, is now "res judicata".

The cases hereinafter referred to clearly demonstrate that the issues in a proceeding before the Federal Trade Commission are to be determined not only by the allegations of the complaint, but also by considering questions actually litigated and considered during the course of the proceeding.

In the case of New York Cent. & H. R. R. Co., et al. v. Interstate Commerce Commission, 168 F. 131, there was an application by the complainant railroads for an Injunction restraining the Interstate Commerce Commission from enforcing an order against them which had been entered in a proceeding instituted by a milling company requesting the Commission to fix rates upon wheat and other grains. The railroads contended that the order fixing the rates was invalid because it went beyond the issues raised in the proceeding instituted by the milling company, wherein they were defendants. The milling company in the prior proceeding specifically asked the Commission to fix the rate upon grain which it shipped from Chicago points to New York Harbor at the same amount as was fixed upon export grain. Commission did not grant this relief, but instead gave the milling company the benefit of the rate upon flour milled in transit and exported. It was because of this variance between the issues raised by the pleadings in the former proceeding and the order entered in the former proceeding that the railroads sought the injunction.

In overruling the railroads' contention, the Court in an opinion by Noyes, C. J., said at pages 138-139:

" * * If this order were a judgment of a

court, we should without hesitation say that the facts alleged in the petition did not support it. The Interstate Commerce Commission is, however, an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such factsmight be presented by evidence technically outside the issues raised. Notwithstanding, therefore, that the commission has established rules of practice analogous to those in courts, notwithstanding that its rules even provide that hearings shall be had upon issues joined, we are of 1 the opinion that the strict rules of pleading should not be held applicable to it. Before we declare an order of the commission invalid as being outside the issues, we think that we should be satisfied that it is outside the issues actually presented to the commission and upon which the parties were heard. We have, therefore, thought it our duty to examine the evidence and consider the claims of the parties made upon the hearing before the commission. Through such examination we find that the milling company and the carriers appeared before the commission, and that the various phases of the discriminations claimed to exist against the milling company were fully inquired into, including that claimed to exist in favor of interior millers enjoying the milling in transit privilege. As the hearing progressed, its scope apparently widened, and at its conclusion we are satisfied that the real question before the commission in the minds of all the parties was whether it was proper and practicable to afford relief like that granted by the order." (Emphasis supplied)

In the case of Fleming, Administrator of Wage and Hour Division, United States Department of Labor v.

Miller, et al., 47 F. Supp. 1004, an action was brought to enforce the Fair Labor Standards Act, and the dedefendants contended that the decree should be vacated, suspended or modified, because it went beyond the issues raised by the pleadings. In answer to defendants' argument the Court, in an opinion by Joyce, D. J., said at page 1007:

doctrine that parties may litigate by consent issues not raised by the pleadings if the court has jurisdiction over the subject matter."

In Paine & Williams Co. v. Baldwin Rubber Co., 113 F. 2d 840, a patent infringement action was brought by the plaintiff against the defendant and from a judgment dismissing the bill of complaint the plaintiff appeals. The defendant was the licensee of the plaintiff and the issue of infringement was held by the lower court to be "res judicata" because of a judgment in a suit at law between the same parties based upon the license agreement. The Court, in an opinion by Allen, C. J., in upholding the lower court's ruling on the plea of "res judicata", said at page 843:

"An issuer is a single, certain and material point arising out of the allegations and contentions of the parties. The issue may normally be ascertained by an inspection of the pleadings. In the freer modern practice, an issue cometimes arises from the affirmation on one side and the denial on the other of some material point of law or fact as developed by the evidence, though not presented by the pleadings." (Emphasis supplied)

In Thomson v. Leak, 185 C.A. 544, 27 P. 2d 795, it was said:

" * Further still, a finding may be made without the framed issues if the case was tried upon any theory which would support the finding."

In Shelley v. Board of Trade of San Francisco, et al., 87 C.A. 344, 262 P. 403, the Court, in quoting from a prior decision said:

"In Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 P. 502, 503, the court says:

"The rule just stated (referring to the fact that a finding outside the issue must be disregarded) is subject to the qualification that a finding may be considered where the issue, though not formally raised by the pleadings, was tried in the court below without objection."

In furtherance of the well-settled principle that the doctrine of "res judicata" should receive a liberal construction and should be applied without technical restrictions, it is said in 2 Black on Judgments, section 614:

"The doctrine of res adjudicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated.

For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated and which actually determined the verdict or finding, whether it was statedly and technically in issue or not." (Emphasis supplied)

If the Commission in the prior proceeding had included within its cease and desist order the prohibition against respondents entering into individual exclusive screening agreements with motion picture theatres for the screening of motion picture advertising, irrespective of any conspiracy so to do, these respondents most certainly could never have contended that the Commission's order went beyond the issues tried and considered in that proceeding. Counsel for the respective respondents unanimously considered that that question was an issue in the prior proceeding. Likewise, counsel for the Commission most certainly concurred, otherwise he would not have recommended to the Commission a form of order which would have directed the respondent distributors to cease and desist from individually entering into exclusive contracts with motion picture theatres for the screening of motion picture advertising.

For the reasons above stated, we submit that the plea of "res judicata" should be sustained and the complaint dismissed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed on the grounds that exclusive theatre screening agreements for periods of one to five years are necessary for the operation of the motion picture advertising business, and that the individual soliciting and obtaining thereof by M.P.A. do not constitute an unfair method of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act, and that the prevention of such contracts is not in the interest of the public, because (a) they do not unduly restrain competition, and (b) they have not created, or tended to create, in M.P.A. a monopoly.

In the alternative, we respectfully submit that the

plea of "res judicata" should be sustained on the ground that the same issue between the same parties was decided in favor of M.P.A. in the matter entitled "Screen Broadcast Corporation, et al.", 36 F.T.C. 957-962.

Respectfully submitted,

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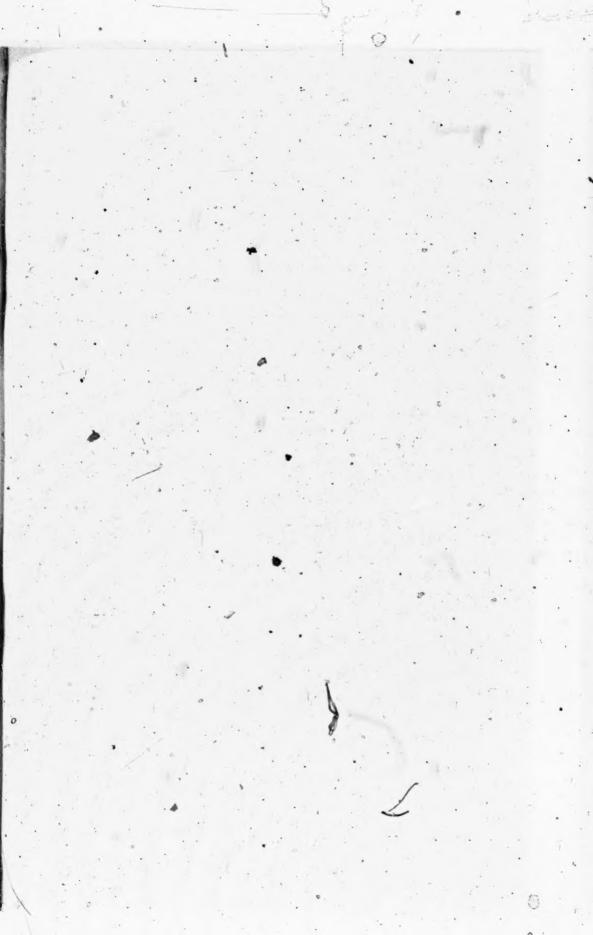
Of Counsel.

CERTIFICATE

I, the undersigned, do hereby certify that I have this day served copies of the above and foregoing brief for Motion Picture Advertising Service Company, Inc. on the Solicitor General of the United States, by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, November , 1952.

Charles Rosen



Office - Supreme Court, U.S.

FEB 16-1953

IN THE

HAROLD D. VOLLEY, CL.

upreme Court of the United States OCTOBER TERM, 1952

No. 75

FEDERAL TRADE COMMISSION.

Petitioner,

63

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING.

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MOTION PICTURE ADVERTISING SERVICE: COMPANY, INC.

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PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Comes now Motion Picture Advertising Service Company, Inc., the appellee in the above entitled cause, and presents this, its petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

The majority opinion of the Court rendered on February 2, 1953 is erroneous and contrary to the law and the evidence, and prejudicial to the rights of respondent in the following respects:

A.

The Court erred in holding that it is for the Commission and not for the courts to determine whether a method of competition is unfair under Section 5(a) of the Federal Trade Commission Act.

The majority opinion states:

"The precise impact of a particular practice on the trade is for the Commission, not for the courts, to determine."

This holding is directly in conflict with the holding in Federal Trade Commission v. Gratz, 253 U.S. 421, 427, in which your Honors said:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not for the Commission ultimately to determine as a matter of law what they include."

In National Biscuit Company v. Federal Trade Commission, 299 F. 738, the Second Circuit Court of Appeals said:

"Whatever may be the exact meaning of the phrase unfair methods of competition' it is now settled that it is for the courts and not for the Commission to determine as a matter of law what is and what is not included in the phrase. This ruling is not avoided by stating as a finding of fact what is a mere conclusion of law."

If the courts are to be bound by the findings and conclusions of the Commission, judicial review is a mere vain formality.

It is indispensable to the Government's case to establish that either the actual or the probable effect of contracts in excess of one year is to substantially lessen competition, or tends to create a monopoly. The finding by the Commission to that effect was a mere conclusion at law and was not supported by any evidence whatever.

B

The Court erred in finding that it has become standard practice to enter into a theatre screening agreement for a term of one year. In its opinion the majority said:

"These contracts run for terms up to five years, the standard one being for one year." The Court also said:

"The Commission found that the term of one year had become a standard practice and that the continuance of exclusive contracts so limited would not be an undue restraint upon competition in view of the compelling business reasons for some exclusive arrangement."

In making these statements the Court confused the Commission's finding as to the standard term of a theatre screening agreement with the standard term of an advertising contract. In Paragraph Five of its Findings of Fact the Commission said:

"In the conduct of its business the respondent enters into written screening agreements with exhibitors and theatres for a maximum period of five years with the majority being written for two-year and one-year terms. It was estimated that about 25% of respondent's screening agreements were for a period of five years. " " (R. Vol. I, 58-59)

and, in Paragraph Six of its Findings of Fact, the Commission said:

"In connection with the sale or distribution

of respondent's screen advertising service, the respondent enters into contracts with advertisers usually for a period of one year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theatres weekly or every other week for a period of usually one year. * * " (R. Vol. I, 59)

Not only did the Commission not make a finding of fact that the standard theatre screening agreement is for a term of one year, but all of the undisputed evidence is that since the beginning of the industry more than thirty years ago, all distributors alike have entered into exclusive theatre screening agreements for terms of from one to a maximum of five years, and that about 25% of respondent's contracts run for a term of five years.

The exhibits in the record show that there are approximately 20,306 theatres in the United States, and about 12,676 exhibited film advertising. Respondent has agreements with 4,096, of which 2,493 contain the exclusive clause. Of these 2,493, 594 run for one year, 491 for two years, 302 for three years, and 1,106 for five years.

Accordingly, the majority opinion is based upon an erroneous statement of the Findings of Fact as made by the Commission.

The Court erred in holding that there was substantial evidence to support the finding of the Commission that respondent's exclusive contracts unreasonably restrain competition and tend to create a monopoly.

The finding of the Commission is not supported by any evidence whatever.

The record of nearly 2,000 pages shows indisputably that the present method of doing business is necessary to the proper conduct thereof, and is beneficial to the distributors, theatres, advertisers and the public. There was no evidence whatever that any competitor of respondent was forced out of business because of respondent's exclusive contracts.

The record establishes without contradiction that the reasons respondent's competitors were unable to obtain theatre contracts was not because of respondent's exclusive screening agreements, but was because of their refusal to offer to pay as much as respondent for the screen privilege, the inferior quality and character of their films, the intermittent type of advertising service offered which was not sufficiently remunerative to the theatre, and the fact that their producer was unable to secure raw supplies during the war years and, therefore, had no films to sell.

The only witnesses placed on the stand by the Government were T. P. Grinspan, J. A. Pope, Nobles C. Campbell, W. Bill Reichart, Rene P. Karrigan and Robert Weigand. Grispan, Pope and Campbell were distributors of films purchased from Parrot Distributing Company. They all admitted that the films were of inferior quality, were not acceptable to the theatres, and that during the war years, Parrot Distributing Company was unable to secure raw film supplies. Not a single one testified that he was forced out of business because of respondent's exclusive contracts. W. Bill. Reichart testified, to the consternation of the Government, that exclusive contracts were beneficial to all concerned, including the theatre, the distributor and the advertiser. He further testified that he had the first

opportunity to obtain some theatre contracts in Texas with a chain of theatres, and that the reason he did not secure the contracts was because he bid only \$3.00 per ad per performance, whereas respondent bid \$7.50 per ad per performance, and that he was not willing to meet the offer, Respondent secured this contract subsequent to the rejection of Reichart's offer by the theatre.

Karrigan and Weigand were officers of Commerce Pictures Company in New Orleans. Not only were they not forced out of business, but they both stated that their Company was able to get wider coverage by virtue of respondent's theatre contracts, and that respondent never refused to exhibit films for them on theatre screens under contract. All of the witnesses for both the Government and respondent testified that the theatres generally awarded the contract to the company that made the highest bid for the screen, and distributed the best quality of the advertising films. Every theatre exhibitor who testified stated that he would rather give up film advertising than do business with more than one company at the same time. Many theatre owners stated that they insisted upon contracts for a longer term than one year, or otherwise would not offer their screens for advertising. The record establishes without contradiction the necessity for exclusive contracts for terms in excess of one year. Advertising agents all agree that they need to be assured of space for longer than one year before they will use this medium for their client's advertising.

It was conceded by everyone that all competitors alike from the very beginning of the industry more than thirty years ago have secured exclusive screening agreements for periods of from one to five years.

It was also conceded by all witnesses alike that there is and always has been free, open, active and substantial competition among all distributors for the securing of theatre screening agreements. Theatres frequently change distributors at the termination of the contract. The 1,106 five-year contracts of respondent constitute contracts with only 5½% of the total theatres in the United States, and only 8.7% of the theatres which will display screen advertising. The 1,899 contracts of respondent that run for terms in excess of one year constitute contracts with only 9% of the total theatres in the United States, and only 15% of the theatres which will display screen advertising.

We respectfully submit that this falls far short of establishing any monopoly in respondent.

Both the Commission and the Court undertake to add all of the exclusive contracts of respondent with those of the other three distributors who were respondents in the other cases, and then say that the four respondents together control 75% of the market. In the first place, many of the contracts are for a term of one year, which are upheld as legal. In the second place, since no conspiracy has been charged, respondent's contracts must be viewed separately in order to determine whether there is a monopoly, and we submit that the figures show that respondent has no control of the market. If the Commission were permitted to add together all of the contracts of all competitors to determine the issue of monopoly, it would be justified in rendering anti-monopoly orders against a mere tyro with a small percentage of the business, on the ground that he, together with all of his competitors, approximate 100% of the total industry.

We, therefore, submit that the findings of the Commission that contracts for longer than one year unduly restrain competition or tend to create a monopoly are not supported by any evidence whatever.

In Federal Prade Commission v. Gratz, 253 U.S. 421, your Honors said that the words "unfair methods of competition" are clearly inapplicable to practices never heretofore regarded as opposed to good morals or as against public policy, and further, that the Federal Trade Commission Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

D

The Court erred in holding that respondent's exclusive contracts should be restricted to a term of one year in the interest of the public.

The principle decided in this case is very far-reaching. It not only prevents the owner of property from leasing it for a reasonable period of time, but also destroys the value of the property that is the subject of the contract. No one has ever contended that a theatre owner would not have the right to lease his lobby, his ground floor stores, his basement, or his roof for advertising purposes for as long as he wants. Here, for the first time, the Court has decided that a theatre owner cannot lease his screen for a period of more than one year. The order restricts one class of persons (trailer-ad distributors) from buying what another class (theatre owners) may want to sell, viz., a lease of the theatre screen for more than one year.

This is not a case where the bargaining power is

vested in respondent. The terms of the contract are not dictated by respondent but by the theatre exhibitors who have screen space to lease. The effect of the Court's decision here is to upset a long-standing and widely-practiced business arrangement. If the contracts are limited to one year, obviously the theatres (who are not parties to this suit) will have to take less for their screen privilege. Respondent cannot afford to pay as much consideration for a one-year contract as for a longer contract. The decision will have the effect of destroying the value of the screen privilege, and will thus lessen competition and not increase it.

E.

The Court erred in holding that respondent's exclusive contracts unreasonably restrain competition and tend to create a monopoly, and are "unfair methods of competition" under Section 5(a) of the Federal Trade Commission Act.

There is no charge of any combination or conspiracy among the four respondents, or between any of them to restrain trade. There is and always has been free; open, active and substantial competition among all distributors in the securing of theatre screening agreements. Respondent, acting independently of its competitors, has undertaken to negotiate theatre screening agreements for more than thirty years past with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition. Some theatre owners demand a contract for one year. Others demand a longer term contract. Many of them demand guarantees payable in advance. Many theatre owners testified that they would

rather forego the advantages of screen advertising if the contracts are limited to a term of one year. We, therefore, submit that the contracts of respondent do not unreasonably restrain competition, and are not unfair methods of competition. The screening agreements are not longer than business necessity dictates for the execution of effective advertising programs. This method of doing business is not some new scheme adopted by respondent to stifle competition. In Federal Trade Commission v. Gratz, 253 U.S. 421, 428, your Honors said:

"If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

Here is a case where the business men, including theatre owners and distributors alike, have decided from the very inception of the industry that theatre screening contracts should run for terms of from one to five years. But the Commission undertakes to substitute its judgment for that of the business men and to declare illegal contracts in excess of one year. The cease and desist order will lessen competition and destroy the value of the screen privilege. It will also be disadvantageous to the theatre, the advertiser, the distributor and the public.

As pointed out by Commissioner Mason in his dissenting opinion, the chief benefactor of motion picture advertising is the small theatre owner, and the revenue thus obtained by the small theatre owner is a subsidy to keep him alive. The cease and desist order will hurt him by destroying the value of his screen privilege, and by preventing him from leasing it on the terms that he sees fit. It cuts him down to a one-year lease instead of a longer one for which he can obtain more money.

The order also hurts the advertiser by destroying the value of motion picture advertising as a medium. Advertisers need to be assured of space for a longer term than one year in order to plan their advertising, particularly since the term of the screen privilege and the term of the advertising contract overlap each other.

The testimony is uncontradicted that theatres frequently change distributors from time to time. There were introduced in the record forty-nine letters received by respondent, twenty-nine of which were notices from theatres that their screens had been taken away from respondent and given to competitors, and twenty of which were notices from theatres that their screens had been taken away from competitors and given to respondent. (R. Vol. II, 84)

The majority opinion states:

"It is, we'think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is, therefore an 'unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act."

The record fails to establish that respondent has sewed up the market. The testimony is uncontradicted that about one-third of respondent's contracts come up for renewal each year, so that the average length of the agreements is about three years. Under the circumstances shown to exist, competitors of respondent have the right to, and actually do, compete for their contracts at all times, and are able to take away from respondent a third of its contracts each year.

We respectfully submit that this uncontradicted testimony fails to establish that respondent has sewed

up the market, and foreclosed to competitors available outlets.

We, therefore, submit that respondent's contracts do not unreasonably restrain competition.

We also submit that respondent's contracts do not tend to create a monopoly. As shown above, respondent's contracts that run for more than one year constitute no monopoly of the theatre screens of the United States. Out of a total of 20,306 theatres, respondent has only 491 two-year contracts, 302 three-year contracts, and 1106 five-year contracts. This falls far short of any monopoly.

We respectfully submit that the Government has completely failed to establish that the proposed cease and desist order is necessary to increase competition, or to prevent a monopoly.

In Standard Oil Company v. United States, 337 U.S. 293, Justice Jackson said:

"If the courts are to apply the lash of the antitrust laws to the backs of business men to make them compete, we cannot in fairness apply the lash whenever they hit upon a successful method of competing."

We respectfully submit that a rehearing should be granted.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the judgment handed down on February 2, 1953 be set aside,

and the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, counsel for the above named Motion Picture Advertising Service Company, Inc., do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PROOF OF SERVICE

I, the undersigned counsel for Motion Picture Advertising Service Company, Inc., do hereby certify that I have this day served copies of the above and foregoing petition for rehearing on the Solicitor General of the United States by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, February , 1953,

LOUIS L. ROSEN

